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Supreme Court, U.S.
FILED

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No. 03-_____

IN THE

Supreme Court of the United States

PAT BARBER,

Petitioner,

– v. –

TEXAS DEPARTMENT OF TRANSPORTATION, ET AL.,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF TEXAS

PETITION FOR WRIT OF *CERTIORARI*

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108 pp

QUESTION PRESENTED FOR REVIEW

To express his concern about questionable techniques employed by law officers to obtain consent to search cars on the highway, Petitioner Pat Barber, an attorney in Colorado City, Texas, erected a billboard on his property adjacent to Interstate 20 that stated "Just Say NO To Searches" and displayed a phone number where a recorded message provided additional information. Following a contact from the local sheriff, the Texas Department of Transportation initiated action under the Texas Highway Beautification Act to require Petitioner to remove the billboard. A 6-3 majority of the Texas Supreme Court upheld this action.

The question presented for review in this application is:

> Whether the Texas Supreme Court majority erred in concluding that the Texas Highway Beautification Act can be applied, consistent with the First Amendment, to prohibit Petitioner from engaging in political speech on a billboard on his own property.

PARTIES TO THE PROCEEDING

Parties to the Trial Court's Order:

Petitioner - Pat Barber

Respondents - Texas Department of Transportation; Charles W. Heald, P.E., Executive Director of the Texas Department of Transportation, in his official capacity; A. James Henry III, Interim Director, Right-of-Way Division, Texas Department of Transportation, in his official capacity; Maribel P. Chavez, P.E., Abilene District Engineer, Texas Department of Transportation, in her official capacity; Blair W. Haynie, P.E., Director of Transportation, Planning and Development, Texas Department of Transportation, in his official capacity; and then Texas Attorney General John Cornyn.

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Petitioner submits this petition for a writ of *certiorari* to review the judgment of the Texas Supreme Court and to vindicate his First Amendment right of expression.

OPINIONS BELOW

The majority and dissenting opinions of the Texas Supreme Court (App., *infra*, 1a-42a) are published at 111 S.W.3d 86. The opinion of the Texas Court of Appeals upholding Petitioner's First Amendment rights (App., *infra*, 43a-63a) is published at 49 S.W.3d 12. The judgment of the Texas District Court (App., *infra*, 64a-67a) is unpublished.

JURISDICTION

The Supreme Court of Texas entered its judgment on July 3, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law ... abridging the freedom of speech...." The pertinent provisions of the Texas Highway Beautification Act, TEX. TRANSP. CODE ANN. §391.001 *et. seq.*, are reprinted in the Appendix to this petition. App., *infra*, 68a-78a.

STATEMENT OF THE CASE

In 1997, Petitioner Pat Barber, an attorney in the West Texas town of Colorado City, installed a billboard on his property adjacent to Interstate 20 that stated "Just Say NO To Searches," and provided a telephone number where a recorded message provided further information about police

requests for consent to search. The billboard was erected due to Petitioner's concern about methods employed by law officers to obtain consent to search motor vehicles on the highway. The recorded message at the telephone number listed on the billboard asserted that officers were intimidating motorists with threats to obtain warrants even though they did not have probable cause, and stated that Petitioner was offended by this kind of behavior and felt a duty to inform citizens of their rights.

Following contact by the local sheriff, Respondent Texas Department of Transportation (TxDOT) initiated action to require Petitioner to remove the billboard pursuant to the Texas Highway Beautification Act. TEX. TRANSP. CODE ANN. §391.001 *et seq.* TxDOT did this even though many other road signs in the area did not comply with the Act.[1]

The Texas Highway Beautification Act makes it an offense to willfully erect or maintain outdoor advertising within 660 feet of an interstate highway or primary system if the advertising is visible from the roadway. TEX. TRANSP. CODE ANN. §391.031. "Outdoor advertising" is defined as any sign or display designed or used "to advertise or inform." *Id.* at §391.001(10). The Act declares that advertising erected in violation of its provisions endangers the health,

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[1] The State stipulated that seventeen of the twenty-one enforcement actions by TxDOT concerning signs in Mitchell County during the relevant timeframe were initiated after the incident with Petitioner arose, even though TxDOT had been aware of these other signs for many years. No action was taken against these other, longstanding signs until Petitioner complained to TxDOT of discriminatory enforcement of the Texas Act against him. Nor had the sheriff ever complained to TxDOT about a sign in Mitchell County prior to his contact relating to Petitioner's sign. The Texas Supreme Court summarily declined to address this evidence that the Act was applied in this case to suppress an unpopular message rather than to promote traffic safety or esthetics. App., *infra*, 29a.

safety, welfare, morals, convenience and enjoyment of the traveling public and is a nuisance. *Id.* at §391.034.

The Act exempts several types of signs from its prohibition, including temporary election signs, *id.* at §391.005, directional or other official advertising authorized by law, advertising for the sale or lease of the property on which the sign is located, advertising solely for activities conducted on the property on which the sign is located, and advertising in industrial or commercial areas. *Id.* at §391.031(b). The Act also directs TxDOT to hire a contractor to erect specific signs identifying local service stations, restaurants, hotels, shopping areas, and agricultural interests. *Id.* at §§391.091-391.097.

In response to TxDOT's notice to remove his sign, Petitioner brought suit for injunctive and declaratory relief that TxDOT's threatened application of the Act violated his right to free speech under the First Amendment to the United States Constitution. After initially issuing a temporary injunction against TxDOT, the Texas District Court subsequently granted summary judgment denying Petitioner's requested relief. App., *infra,* 64a-67a.

A three-judge panel of the Texas Court of Appeals reversed, concluding that enforcement of the Act against Petitioner "inverted the hierarchy of First Amendment protection" by permitting him to engage in commercial and some types of noncommercial speech on his property but prohibiting his "purely ideological speech" concerning vehicle searches by law officers. *Id.* at 58a-59a. The Court also concluded that Petitioner had no adequate alternative means of communicating his message because the sign on his property was comparatively cheap and convenient, identified him as the speaker, and was the best and perhaps only means of reaching his targeted audience on Interstate 20. *Id.* at 59a. The Court was not persuaded by the argument that the Act treats onsite commercial and noncommercial speech the same, concluding that there is no commercial equivalent of Petitioner's political speech. *Id.* at 59a-60a.

After granting review, a majority of the Texas Supreme Court reversed the Texas Court of Appeals, upholding TxDOT's order requiring Petitioner to remove his billboard. *Id.* at 1a-31a. While recognizing that the Texas Act "does make certain distinctions based on subject matter," the Court nonetheless rejected the Court of Appeals' conclusion that the Act is content-based. *Id.* at 17a-18a. Instead, the Court concluded, the Act provides comparable treatment for commercial and noncommercial speech. *Id.* at 19a.

The Texas Supreme Court majority distinguished this Court's plurality ruling in *Metromedia v. City of San Diego*, 453 U.S. 490 (1981), stating that unlike the sign ordinance invalidated in that case, the Texas Act does not distinguish between commercial and noncommercial signs dealing with on-site activities or located in commercial and industrial areas. *Id.* at 18a-19a. The Court disapproved a TxDOT regulation that limited the on-site exemption to commercial signs. *Id.* at 19a-20a. The Court concluded that the Texas Act was not enacted based on disagreement with the messages that might be conveyed, but to control the secondary effects of billboards and signs along the highways. *Id.* at 20a.

The Texas Supreme Court also distinguished this Court's opinion in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), which invalidated a city ordinance that prohibited signs on residential property within the city limits. *Id.* at 26a-29a. The Texas Court concluded that the because Petitioner's sign was not on residential property and would have been permitted in some locations under the Texas Act, the concerns expressed by this Court in *Ladue* did not apply in Petitioner's case. *Id.*

Justice Priscilla Owen, joined by two other justices of the Texas Supreme Court, filed a dissenting opinion. *Id.* at 31a-42a. Rejecting the majority's attempts to distinguish this Court's precedent, the dissent concluded that the Texas Act is content-based "by any commonsense understanding of the term" because the content of a sign must be examined to

determine whether it is permissible under the Act. *Id.* at 36a. The dissent rejected the majority's reliance on secondary effects analysis, asserting that "[t]he secondary effects of noncommercial speech that is banned by the Texas Act are no greater or different than those of the speech that is permitted." *Id.* at 35a. The Texas Act, the dissent concluded, is neither content neutral nor narrowly tailored, and therefore is not a valid time, place or manner restriction on protected speech. *Id.* at 36a.

The dissenting justices also concluded that, even if the Texas Act were content neutral, it would not pass constitutional muster under this Court's analysis in *Ladue*. *Id.* at 37a. As was the case in *Ladue*, the credibility of the Texas Act's justification for limiting speech is diminished by the exemptions it permits, the dissent concluded. *Id.* at 38a. Also like the ordinance in *Ladue*, the Texas Act prohibits "absolutely pivotal" political speech through a "venerable means of communication" such as a sign on a person's own property, the dissent observed. *Id.* at 39a.

REASONS FOR GRANTING THE WRIT

Under Rule 10, the Court will grant petitions for writ of certiorari for compelling reasons, which may include correcting a lower court opinion on an important federal question that conflicts with relevant decisions of the Court or resolving conflicts among the lower courts on an important federal question. The Texas Supreme Court's decision in this case conflicts with decisions of this Court in two critical ways: it misapplies the law for determining whether a restriction on speech is content-based and it undervalues Petitioner's right to engage in core political speech on his own property. This Court should grant this application to vindicate Petitioner's First Amendment rights on these issues. In addition, the Court should grant this application because its leading precedent on the application of First Amendment principles to billboards, *Metromedia*, 453 U.S. 490, was

decided by a divided Court and did not feature a majority opinion, leading to disparate and conflicting opinions in the lower courts on the issue.

I. THE TEXAS SUPREME COURT'S DECISION CONFLICTS WITH THIS COURT'S DOCTRINE CONCERNING CONTENT-BASED RESTRICTIONS ON SPEECH

A. The Texas Act is a Content-Based Restriction on Speech

Although the Texas Supreme Court majority recognized that the Texas Act "does make certain distinctions based on subject matter" (App., *infra,* 17a), it nonetheless concluded that the Act is content-neutral. *Id.* at 18a. The Court apparently based this conclusion on its analysis that the Act does not distinguish between commercial and noncommercial signs and was adopted to address the secondary effects of those signs rather than because the Texas Legislature disagreed with any messages that might be conveyed. *Id.* at 20a. This analysis misapplies well-established First Amendment doctrine concerning content-neutrality. In fact, the Texas Act plainly establishes content-based restrictions on speech.

This Court's doctrine for determining whether restrictions on speech are content-based is clear. If the content of speech must be examined to determine whether it is subject to legislative restriction, then the restriction is content-based. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987); *Carey v. Brown*, 447 U.S. 455, 460-1 (1980). The Court has reaffirmed this analysis many times.

By contrast, content-neutral restrictions are those that apply equally to all speech, regardless of content, such as the volume restrictions upheld in *Ward v. Rock Against Racism*,

491 U.S. 781 (1989), or the restrictions on disclosure of intercepted communications at issue in *Bartnicki v. Vopper*, 532 U.S. 514 (2001). It is not necessary to examine the content of speech to determine whether such restrictions apply.

As the dissenting justices of the Texas Supreme Court noted, whether a sign is prohibited under the Texas Act can only be determined by examining its content. App., *infra*, 35a. The Texas Act broadly prohibits signs outside of industrial and commercial areas, unless they satisfy certain exemptions set out in the Act. For example, if a sign involves political campaigns, or sale or lease of the property on which it is located, or activity on the property where it is located, or certain other approved commercial activities, then it is permitted. Each of these exemptions is based on the content of the sign, and the sign's lawfulness under the Act can only be determined by examining its content. The Texas Act clearly defines, by content, what types of signs are and are not permitted. Under any "commonsense understanding of the term," *Discovery Network*, 507 U.S. at 429, the Texas Act establishes content-based restrictions on speech.

The Court has repeatedly rejected the distinction, relied on by the Texas Supreme Court majority, between speech restrictions based on the speaker's viewpoint and those that are based on the content of speech. "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibitions of public discussion of an entire topic." *Arkansas Writers' Project*, 481 U.S. at 230; *Carey*, 447 U.S. at 462 n.6; *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 537 (1980). Censorial motive is not required; even regulations aimed at proper governmental concerns can unduly restrict the exercise of First Amendment rights. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 117 (1991). It is not enough to ask, as the Texas Court did, whether the Texas Act suppresses particular viewpoints. Because the Act permits

speech on some topics and prohibits it on others, it is a content-based restriction on speech.

While it may be tempting to excuse the Texas Act as aimed at highway esthetics rather than suppression of speech, that is an incomplete view of the Act's legal landscape. The Act, in the name of esthetics, *does* broadly suppress issue-oriented political speech such as Petitioner's, while permitting significant exemptions for commercial speech and certain types of noncommercial speech where Petitioner's billboard is prohibited.

B. The Texas Court's Conclusion that the Act Treats Commercial and Noncommercial Speech Comparably Is Both Beside the Point and Mistaken

Based on its interpretation of the plurality opinion in *Metromedia*, 453 U.S. 490, the Texas Court majority concluded that the Texas Act is content-neutral because its exemptions for commercial and industrial areas and for on-site activities treat commercial and noncommercial speech comparably. App., *infra,* 18a-19a. This conclusion is both mistaken and beside the point for purposes of First Amendment analysis.

The Texas Court is mistaken in its conclusion that the Texas Act's exemptions for commercial and industrial areas and for onsite activities treat commercial and non-commercial speech comparably. The exemption for commercial and industrial areas inherently favors commercial speech, since those are areas where commercial activity takes place. The on-site exemption, to the extent that it applies to noncommercial speech,[2] has little effect because issue-

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[2] In reaching this conclusion, the Texas Supreme Court "declined to give deference" to Respondent TxDOT's regulation restricting the on-site exemption to commercial speech, determining that the regulation runs afoul of the concerns expressed by the plurality and concurring opinions in *Metromedia*. App., *infra,* 19a-20a.

oriented speech like Petitioner's is not usually related to activities occurring on the site where the speech occurs. As the First Circuit noted in *Ackerley Communications, Inc. v. City of Cambridge*, 88 F.3d 33, 37 (1st Cir. 1996), the distinction between onsite and offsite messages:

> has the effect of disadvantaging the category of noncommercial speech that is probably most highly protected: the expression of ideas. The only signs containing noncommercial messages that are exempted are those relating to the premises on which they stand, which inevitably will mean signs identifying nonprofit institutions."

Issue-oriented "core" political speech like Petitioner's is not within the scope of the on-site exemption. *But see Southlake Property Associates v. City of Morrow*, 112 F.3d 1114, 1118-9 (11th Cir. 1997) (considering all noncommercial signs to be "on-site" to avoid constitutional concerns), cert. den., 525 U.S. 820 (1998).

Taken as a whole, the Act clearly prefers commercial over noncommercial speech. The exemptions for commercial and industrial areas and for on-site speech, on which the Texas Court focused, are of limited utility for issue-oriented speech like Petitioner's. The Act contains other provisions that apply only to commercial speech, such as the exemption for advertising the sale or lease of the property on which the sign is located and the provisions directing TxDOT to erect signs identifying local service stations, restaurants, hotels, shopping areas and agricultural interests. Thus, while there are significant opportunities for commercial speech under the Act, issue-oriented political speech such as Petitioner's is generally prohibited except in commercial and industrial areas. In the vast, expansive area of West Texas involved in this case, that amounts to a broad prohibition and a narrow exemption. The Texas Act has indeed inverted the constitutional hierarchy of noncommercial over commercial

speech, as condemned in *Metromedia*. 453 U.S. at 513 (plurality).

Moreover, noncommercial speech, particularly core political speech like Petitioner's, is entitled to *more* protection than commercial speech, not *comparable* protection as the Texas Court purports to provide. *Metromedia*, 453 U.S. at 506-7 ("[T]he difference between commercial price and product advertising and ideological communication permits regulation of the former 'that the First Amendment would not tolerate with respect to the latter.'") (plurality); *Connick v. Myers*, 461 U.S. 138, 145 (1983) ("[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values' and is entitled to special protection."); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 563 (1980). As a result, even if the Texas Court were correct that certain exemptions in the Texas Act treat commercial and noncommercial speech comparably, that would not establish that the Act adequately protects noncommercial speech.

The Texas Act also distinguishes types of noncommercial speech that are prohibited and permitted, another practice disapproved by the *Metromedia* plurality. 453 U.S. at 514-5 ("With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse...."). For example, the Act expressly allows temporary elections signs, but contains no exemption for other types of noncommercial speech. The Texas Court acknowledges that this exemption is "arguably content based." App., *infra*, 21a. In addition, the Act's on-site exemption, as the Texas Court interprets it, allows noncommercial signs related to activities on the property but prohibits noncommercial signs like Petitioner's that focus on issues rather than location. In both instances, it is the content of the noncommercial speech that determines whether it is permitted or prohibited.

In short, the *Metromedia* plurality opinion does not support the Texas Court's conclusion that the Texas Act is

content-neutral. The Act plainly provides greater venue for commercial speech than for issue-oriented speech like Petitioner's. It also distinguishes between permissible and prohibited noncommercial speech based on its content. The *Metromedia* plurality's analysis of the San Diego ordinance invalidated in that case applies equally to the Texas Act: "It is apparent ... that the ordinance distinguishes in several ways between permissible and impermissible signs at a particular location by reference to their content." 453 U.S. at 516.

C. The Texas Court's Reliance on Secondary Effects Analysis Is Misplaced

The Texas Court concluded that the Act is content neutral because it was not enacted based on disagreement with any messages that might be conveyed, but "to control the secondary effects of billboards and signs" by stemming visual clutter and promoting public safety. App., *infra,* 20a. However, this Court has clearly established that a justification based on secondary effects does not support content-based distinctions between permitted and prohibited speech that are unrelated to the asserted secondary effects. *Discovery Network*, 507 U.S. 424, 429-30 ("The city has asserted an interest in esthetics, but respondent publishers' [prohibited] newsracks are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks.") As the three dissenting Texas Supreme Court justices noted, "[t]he secondary effects of noncommercial speech that is banned by the Texas Act are no greater or different than those of the speech that is permitted." App., *infra*, 35a.

In *Discovery Network*, the Court rejected secondary effects reasoning virtually identical to that employed by the Texas Court in this case. Like the Texas Court in this case (App., *infra*, 20a), the City contended in *Discovery Network* that its ordinance was content-neutral "because the interests in safety and esthetics that it serves are entirely unrelated to

the content of respondents' publications." 507 U.S. at 429. This Court rejected that argument, concluding that "the very basis for the regulation is the difference in content" between permitted and prohibited speech. *Id.* As a result, the Court concluded, the City could not defend its ordinance as content-neutral because it did not have a neutral justification for its selective ban on one category of speech but not another. *Id.* at 429-30. Similarly, Texas' stated concern for the secondary effects of billboards on esthetics and safety does not explain or justify its decision to ban some billboards and permit others based on their content. The asserted secondary effects are unrelated to the Texas Act's content-based division between permitted and prohibited speech.

This Court has long rejected the argument that restrictions are content-neutral if they have neutral justifications but the distinctions they draw between permitted and prohibited speech are unrelated to those justifications. For example, in *Carey*, 447 U.S. 455, the Court struck down a restriction on picketing that exempted picketing involving a labor dispute. Although the restriction was defended as a measure to protect residential privacy, the Court noted that it drew a content-based distinction between permitted and prohibited picketing even though they were "equally likely to intrude on the tranquility of the home." *Id.* at 462. *See also Arkansas Writers' Project*, 481 U.S. at 231-2 (asserted justifications for statute do not explain selective imposition of burden on some types of speech but not others based solely on content).

D. The Texas Act's Content-Based Restrictions on Speech are Not Narrowly Drawn to Serve a Compelling State Interest

A content-based restriction on speech can be upheld only if it satisfies strict scrutiny. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000); *Arkansas Writers' Project*, 481 U.S. at 231. A statute that regulates speech based on its content must be narrowly tailored to promote a compelling government interest, and the government must use a less restrictive alternative if it would serve the government's purpose. *Playboy*, 529 U.S. at 813. Content-based restrictions are presumptively invalid, and the government bears the burden to rebut that presumption. *Id.* at 817. It is rare that a regulation restricting speech because of its content will ever be permissible. *Id.* at 818. Regulations that permit the government to discriminate based on the content of the message cannot be tolerated under the First Amendment. *Simon & Schuster*, 502 U.S. at 116.

The government's interest in traffic safety and esthetics, while significant, has never been found to be compelling. *Whitton v. City of Gladstone*, 54 F.3d 1400, 1408 (8th Cir. 1995). This Court held long ago that "the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution." *Schneider v. State of New Jersey*, 308 U.S. 147, 163 (1939). What is compelling is society's interest in permitting untrammeled political discussion like Petitioner's criticism of local law enforcement, not its interest in avoiding visual clutter on the highways.

Moreover, the exemptions in the Texas Act undercut any claim that the State's asserted interests are compelling. *Ladue*, 512 U.S. at 52-3 ("Exemptions from an otherwise legitimate regulation of a medium of speech may ... diminish the credibility of the government's rationale for restricting speech in the first place."); *Carey*, 447 U.S. at 465. If the

State's interest in preventing highway signs were truly compelling, it would not have enacted exemptions allowing signs in commercial and industrial areas or signs to advertise property for sale or lease or other activities occurring on-site. Nor would it have directed TxDOT to erect signs giving directions to local service stations, restaurants, hotels, shopping areas, and agricultural interests. The State's asserted interests are not so compelling that it could not permit numerous exemptions, aimed primarily at commercial activity. If the State's interests are not compelling enough to cover "for sale" signs, they are not compelling enough to cover issue-based political speech like Petitioner's.

Texas could clearly adopt a less restrictive alternative that permitted signs such as Petitioner's containing core protected speech. This approach would address significant First Amendment concerns about the Act, and would not necessarily cause a substantial increase, compared to existing exemptions, in the secondary effects that concern the State. There is little justification for the Texas Act's scheme of broadly prohibiting issue-oriented political speech while allowing substantial exemptions for commercial speech. This classification scheme can and should be overturned.

In sum, the Texas Act distinguishes between permissible and prohibited speech based on the content of that speech, and allows substantial opportunity for commercial speech but extremely limited venue for issue-based political speech like Petitioner's sign. It cannot be justified as a regulation of secondary effects because the secondary effects of prohibited speech are not different than those of permitted speech. As a result, the Act is presumptively invalid. Given the nature of the State's asserted interest and the statutory exemptions that undercut that interest, the State cannot show that the Act is narrowly drawn to serve a compelling state interest. Nor is there any reason it could not adopt a less restrictive alternative that allows billboards like Petitioner's containing core speech. In its decision below, the Texas Supreme Court majority misapplied this Court's First Amendment doctrine

on these important issues. The Court should grant this application for review.

II. THE TEXAS COURT UNDERVALUED PETITIONER'S RIGHT TO ENGAGE IN CORE POLITICAL SPEECH ON HIS OWN PROPERTY

Completely aside from its misapplication of First Amendment law dealing with content-based restrictions on speech, the Texas Court's decision significantly undervalues Petitioner's right to engage in core political speech on his own property. This Court has repeatedly concluded that certain types of critical speech and critical venues cannot ordinarily be foreclosed, regardless of whether the challenged restriction is content-neutral or content-based. Petitioner's core political speech on his own property is one of those instances, and should not be subordinated to concerns about "visual clutter" on the highway.

Petitioner's criticism of police action that he believes may infringe the constitutional rights of motorists is plainly the type of "core" speech that enjoys the most rigorous protection under the First Amendment. In *Ladue*, 512 U.S. at 54, the Court characterized as "absolutely pivotal speech" a sign placed in a property-owner's window that stated "Say No to War in the Persian Gulf, Call Congress Now." Petitioner's "Just Say NO to Searches" sign in this case could not be more analogous to the sign at issue in *Ladue*. "Signs that react to a local happening or express a view on a controversial issue both reflect and animate change in the life of a community." *Id.*

In *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-7 (1995), the Court discussed in detail the category of speech that "occupies the core of the protection afforded by the First Amendment." The Court noted that "the speech in which Mrs. McIntyre engaged—handing out leaflets in the advocacy of a politically controversial viewpoint—is the essence of First Amendment protection." The Court stated:

> The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social change desired by the people." ... This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."

See also *Texas v. Johnson*, 491 U.S. 397, 411 (1989) ("Johnson was not, we add, prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values."); *Boos v. Barry*, 485 U.S. 312, 318 (1988) ("[T]he display clause operates at the core of the First Amendment by prohibiting petitioners from engaging in classically political speech. We have recognized that the First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open' ... and have consistently commented on the central importance of protecting speech on public issues."); *Bartnicki*, 532 U.S. at 533-4.

Not only does the Texas Court's opinion bar Petitioner from engaging in core political speech, it prevents him from doing so on his own property. The right to speak on a person's own property is distinct from the right to speak in other locations. For example, in *Ladue* the Court emphasized the right to display signs at a person's residence, noting that "[p]recisely because of their location, such signs provide information about the identity of the 'speaker.'" 512 U.S. at 56. The Court also noted that such signs are an unusually cheap and convenient form of communication, such that the speaker may have no practical or reasonably available alternative. *Id.* at 57. Although Petitioner's sign was not located on residential property, these considerations nonetheless apply in full force, because neighbors and local

residents knew the identity of the speaker by virtue of the sign's location on Petitioner's property, and he had no comparably cheap and convenient alternatives for conveying his message. The dissenting Justices of the Texas Supreme Court concluded that under this Court's rationale in *Ladue*, the Texas Act does not pass constitutional muster. App., *infra*, 37a.

The distinctive importance of being able to speak freely on a person's own property has been recognized in other cases. For example, in *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 811 (1984), the Court noted that "[t]he private citizen's interest in controlling the use of his own property" justified the City's decision to limit its handbill ban to public property. The location of protected speech on private property was also an important factor in striking down the conviction in *Spence v. Washington*, 418 U.S. 405 (1974). *See also Arlington County Republican Committee v. Arlington County*, 983 F.2d 587, 595 (4th Cir. 1993) (striking down limitation on political signs on private property as leaving owner with no viable alternative).

In circumstances like Petitioner's, involving core political speech on his own property, the Court should apply heightened scrutiny regardless of whether the challenged restriction is content-based or content neutral. *McIntyre*, 514 U.S. at 347 ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.") The Court has applied such exacting scrutiny in several recent cases, without regard to whether the challenged restriction was content-based, to protect core speech in key locations. In *Bartnicki*, the Court invalidated a content neutral restriction on publication of intercepted information because it implicated the core First Amendment purpose of protecting publication of truthful information of public concern. 532 U.S. at 533-4. In *Ladue*, the Court struck down a restriction on residential signs, which it

assumed was content neutral, because it covered "absolutely pivotal speech" such as a war protest sign and there were not adequate substitutes to display of such signs on a person's own property. 512 U.S. at 54, 56.

As was the case in *Ladue*, the application of the Texas Act in this case leaves Petitioner no adequate substitute for communicating his message. The billboard on his property was an inexpensive and effective way of conveying his concerns about questionable search techniques to the affected audience—motorists on Interstate 20. The location of the sign on his property also conveyed a distinctive message to neighbors and local residents, who understood not only the content of the sign but also the source—a local attorney with some knowledge of the law relating to police searches. Petitioner does not have adequate substitutes under the Act, because any permitted communication would cost substantially more, lose its direct association with Petitioner, and be in a location less visible to his target audience. Application of the Act to Petitioner in this case is unquestionably a significant and effectively complete restriction on his ability to engage in core political speech with the audience affected by that speech.

Like the ordinance invalidated in *Ladue*, the Texas Act "simply prohibit[s] too much speech." 512 U.S. at 51, 55. Under the First Amendment, it is not acceptable to prohibit issue-oriented political speech such as Petitioner's outside of commercial and industrial areas, including on private property, along all major highways in Texas. Petitioner's core political speech deserves the highest level of protection, and he has no adequate substitute to displaying it on his own property.

III. THE COURT SHOULD CLARIFY ITS DIVIDED OPINION IN *METROMEDIA* AND ADDRESS THE SIGNIFICANT DISCORD AMONG LOWER COURTS CONCERNING APPLICATION OF THE FIRST AMENDMENT TO BILLBOARDS

Metromedia, this Court's principal case addressing application of the First Amendment to billboards, involved several opinions espousing significantly different approaches, none of which commanded a majority of the Court. While Justice White's plurality opinion is generally viewed as the lead analysis, there is significant uncertainty both about its application and about its authority as doctrine of the Court. Various comments have been made about the difficulty in drawing clear direction from the disparate opinions in *Metromedia*. *See Metromedia*, 453 U.S. at 569 (Rehnquist, J., dissenting); *Rappa v. New Castle County*, 18 F.3d 1043, 1047 (3rd Cir. 1994) (*Metromedia* has little precedential effect because it was a badly splintered opinion that has arguably been undermined by more recent decision).

Reflecting this uncertainty, the lower courts have gone in disparate directions in applying the First Amendment to billboards. Several circuits have taken a relatively broad view of *Metromedia*, invalidating various restrictions on billboards. *Matthews v. Town of Needham*, 764 F.2d 58 (1st Cir. 1985); *Ackerley*, 88 F.3d 33; *National Advertising Co. v. Town of Babylon*, 900 F.2d 551 (2nd Cir. 1990), cert. den., 498 U.S. 852 (1990); *Whitton*, 54 F.3d 1400. Others have upheld billboard restrictions based on a considerably narrower reading of *Metromedia*. *Major Media of the Southwest v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986), cert. den., 479 U.S. 1102 (1987); *Wheeler v. Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987), cert. den., 484 U.S. 1007 (1988); *Messer v. City of Douglasville*, 975 F.2d 1505 (11th Cir. 1992), cert. den., 508 U.S. 930 (1993). State courts are similarly divided, as reflected in the varying opinions of the Texas appellate courts below.

This case presents an ideal opportunity for the Court to address these uncertainties. It presents a strong set of facts around which to frame a clear First Amendment analysis, along with capable development of the disparate viewpoints by the courts below. It also illustrates the broad restrictions that can be placed on core political speech in the name of esthetics, while allowing significant commercial speech, under the uncertain direction of *Metromedia*. The Court should grant this application not only to address the significant restriction on core speech that it involves, but also to clarify First Amendment doctrine in this important area of the law.

CONCLUSION

The Court should grant this application for several reasons. Most importantly, the Texas Supreme Court's opinion denying Petitioner's right to engage in core political speech on his own property is inconsistent with two critical lines of First Amendment precedent. First, the Texas Court's analysis conflicts with this Court's doctrine that a restriction on speech is content-based if the content of speech must be examined to determine whether it is permitted or prohibited. Under this commonsense standard, the Texas Act is clearly content-based. Not only must the content of signs be examined to determine whether they are permitted or prohibited, but the Act also distinguishes permitted from prohibited noncommercial speech based on its content.

The content-based nature of the Act is not altered by the Texas Court's erroneous conclusion that the Act treats commercial and noncommercial speech comparably, nor by the Texas Court's reliance on a secondary effects justification when the Act's content-based distinctions are unrelated to those effects. As a content-based restriction on speech, the Act is invalid because it is not narrowly tailored to serve a compelling state interest. The First Amendment should not tolerate a virtual ban on issue-oriented core speech on major

Texas highways outside of commercial and industrial areas, when the statute allows significant opportunities for commercial speech in such areas.

Second, the Texas Court's opinion undervalues Petitioner's right to engage in core political speech on his own property, contrary to this Court's precedent recognizing that restrictions on critical speech in key locations must be strictly scrutinized regardless of whether they are content-based. Under this line of analysis, Petitioner's core speech on his own property merits maximum First Amendment protection, and he has no adequate substitute for such expression. By broadly prohibiting issue-oriented speech like Petitioner's along major Texas highways outside of commercial and industrial areas, including on a person's own property, the Texas Act simply prohibits too much speech.

Finally, the Court should grant this application to clarify First Amendment doctrine as it applies to billboards. The Court's divided opinion in *Metromedia* has engendered significant inconsistency in the lower court opinions on this issue. This application presents a compelling factual situation and well-developed opinions below that make it an ideal vehicle to address the uncertainty that exists in this important area of the law.

Petitioner respectfully requests that his application for writ of *certiorari* be granted.

Dated: September 29, 2003

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF TEXAS

NO. 01-0414

TEXAS DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

PAT BARBER, RESPONDENT

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

JUSTICE ENOCH delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE O'NEILL, JUSTICE JEFFERSON, JUSTICE SCHNEIDER, and JUSTICE WAINWRIGHT joined.

JUSTICE OWEN filed a dissenting opinion, in which JUSTICE HECHT and JUSTICE SMITH joined.

This case involves the constitutionality of the Texas Highway Beautification Act.[1] We must decide whether the Act, which precludes Pat Barber from displaying a particular billboard on his nonresidential property, violates Barber's free speech rights under the United States Constitution or the Texas Constitution. The court of appeals held that the Act violated Barber's rights under the United States Constitution as applied to his expression of noncommercial, ideological speech.[2] We disagree and hold that the Act is content neutral and constitutes a valid time, place, and manner restriction as applied to

[1] TEX. TRANSP. CODE ch. 391.

[2] 49 S.W.3d 12, 25.

Barber's billboard. We therefore conclude that it does not violate Barber's federal guarantee of free speech. We also conclude that the Texas Constitution affords him no more protection under the circumstances than the federal constitution. We accordingly reverse the court of appeals' judgment and render judgment for petitioners (collectively, "TxDOT").

I. THE TEXAS HIGHWAY BEAUTIFICATION ACT

The Texas Highway Beautification Act was passed in response to the Federal Highway Beautification Act, which requires states to effectively control the erection and maintenance of signs within 660 feet of interstate and primary highways and beyond 660 feet in non-urban areas if the signs are designed to be and are visible from such highways.[3] The Federal Act seeks to curb the proliferation of signs along the nation's highways and to "protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty."[4] The Federal Highway Beautification Act provides that if states fail to make provisions for effectively controlling such signs, they risk losing ten percent of their federal highway funds.[5]

The express purpose of the Texas Act is to comply with federal law: "[I]t is the intent of the legislature to comply with the Highway Beautification Act of 1965 (23 U.S.C. Sections 131, 136, 319) to the extent that it is implemented by the United States Congress. This chapter is conditioned on that law."[6] The Texas Act declares that outdoor advertising erected in non-compliance with its provisions "endangers the health, safety, welfare, morals, convenience, and enjoyment of the traveling public and the protection of the public investment in the interstate and primary highway systems."[7] It also constitutes a

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[3] 23 U.S.C. § 131(a), (c).

[4] *Id.* § 131(a).

[5] *Id.* § 131(b).

[6] TEX. TRANSP. CODE § 391.002(a).

[7] *Id.* § 391.034(a)(1).

"public nuisance."[8]

Thus, the Texas Act prohibits "outdoor advertising" in a limited area: (1) within 660 feet of a right-of-way, if the advertisement is visible from the interstate or primary highway system, or (2) if outside an urban area, more than 660 feet from the right-of-way, but visible from the highway and erected for the purpose of having its message seen from the highway.[9] "Outdoor advertising" is defined as:

> an outdoor sign, display, light, device, figure, painting, drawing, message, plaque, poster, billboard, or other thing designed, intended, or used to advertise or inform if any part of the advertising or information content is visible from the main-traveled way of the interstate or primary system.[10]

The Texas Act specifically exempts from regulation:

> (1) directional or other official outdoor advertising authorized by law, including advertising pertaining to a natural wonder or a scenic or historic attraction;
>
> (2) outdoor advertising for the sale or lease of the property on which it is located;
>
> (3) outdoor advertising solely for activities conducted on the property on which it is located;
>
> (4) outdoor advertising located within 660 feet of the nearest edge of a right-of-way in an area in which the land use:
>
> > (A) is designated industrial or commercial under authority of law; or
> >
> > (B) is not designated industrial or commercial under authority of law but the land use is consistent with an area designated industrial or commercial;
>
> (5) outdoor advertising that has as its purpose the

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[8] *Id.* § 391.034(a)(2).

[9] *Id.* § 391.031(a)(1), (2).

[10] *Id.* § 391.001(10).

protection of life and property; or

(6) outdoor advertising erected on or before October 22, 1965, that the commission, with the approval of the secretary of the United States Department of Transportation, determines to be a landmark of such historic or artistic significance that preservation is consistent with the purposes of this subchapter.[11]

In addition, the Texas Act exempts from regulation a sign erected solely for and relating to a public election if the sign:

(1) is on private property;

(2) is erected not earlier than the 90th day before the date of the election and is removed not later than the 10th day after the election date;

(3) is constructed of lightweight material; and

(4) has a surface area not larger than 50 square feet.[12]

II. THIS CASE'S HISTORY

In 1997, Barber, who is an attorney, installed an eight foot by sixteen foot billboard on nonresidential property he owned adjacent to Interstate 20, in Mitchell County, Texas. The billboard stated, "Just say NO to Searches," and displayed a telephone number. Callers to that number reached an answering machine that played a two-minute, pre-recorded message about a citizen's rights to refuse to have their vehicles searched by police:

> This recorded information is provided as a public service by Pat Barber's Law Office in regard to the large number of unreasonable searches being pursued by state officers on the highways. Officers are relying on people's ignorance of their right to search.
>
> Many people are being intimidated; often, when an officer has asked for a search and is refused, the officer will threaten to obtain a warrant from a judge. This threat is a bluff because most of the time the

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[11] *Id.* § 391.031(b).

[12] *Id.* § 391.005.

officer doesn't have probable cause. When an officer threatens to get a warrant and knows he doesn't have probable cause, he is intimidating the citizen through deception.

Most people don't know that an officer can't get a warrant to search unless he proves to a judge that probable cause of a criminal offense exists.

An innocent citizen may have nothing to hide, but has done nothing wrong, and should know that when an unreasonable search request is refused, the officer must let him go.

When an officer has permission to search, the vehicle may be taken apart and the contents are thrown on the ground so the drug dogs can work.

I know about one lady traveling in a late model suburban who was seen standing by the side of the road trying to hold her hair together in a 20 m.p.h. wind while officers threw her possessions on the ground. After the officers finished the search and left, a local citizen stopped and helped her pick up her things.

I am offended by this kind of police behavior, and I feel a duty to inform citizens about their rights.

Just say NO to Searches . . . it's your constitutional right. If you would like to leave a message, please wait for the beep. Good luck and have a safe trip.

A newspaper story about the billboard appeared in the *Abilene Reporter News*. Barber asserts that, shortly thereafter, he received a letter from TxDOT, the entity charged with enforcing the Texas Highway Beautification Act,[13] stating that the billboard violated the Act and requesting that Barber remove it. According to Barber, TxDOT did this even though many other roadsigns in Mitchell County did not comply with the Act. Correspondence between Barber and TxDOT ensued

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[13]*See id.* § 391.034(b).

but no agreement was reached, and TxDOT set a deadline for Barber to remove his billboard.

In response, Barber filed suit seeking injunctive relief and a declaratory judgment that the Act is unconstitutional. TxDOT counterclaimed, seeking a permanent injunction requiring Barber to remove his billboard. Barber initially secured a temporary injunction prohibiting TxDOT from enforcing the Act against him. But the trial court subsequently overturned the injunction and granted summary judgment to TxDOT, holding that the Act was constitutional under the Texas and United States constitutions, both on its face and as applied to Barber. The trial court permanently enjoined Barber from displaying the billboard. Barber removed his billboard and appealed the trial court's judgment.

The court of appeals reversed.[14] The court of appeals held that the Texas Highway Beautification Act, as applied to Barber, violated the First Amendment to the United States Constitution.[15] According to the court of appeals, the Act permitted Barber to engage in commercial speech and some types of noncommercial speech on his property, but it prohibited purely ideological speech by Barber on his property.[16] Further, the court of appeals concluded that Barber had no adequate alternative means of communicating his message.[17] Because the court concluded that the Act violated Barber's federal guarantee of free speech, it did not resolve the question raised by Barber of whether the Texas Constitution provides more protection than the United States Constitution.[18]

TxDOT petitioned this Court to consider these important constitutional questions. We granted the petition and requested supplemental briefing on whether the questions raised were

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[14] 49 S.W.3d at 12, 25.

[15] *Id.* at 24-25.

[16] *Id.* at 24.

[17] *Id.* at 25.

[18] *Id.* at 16 n.3.

moot because Barber had removed his billboard in compliance with the trial court's judgment. We conclude that the questions are not moot,[19] and we now address them on the merits.

III. ANALYSIS

A. The United States Constitution's First Amendment

It is well-settled that "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."[20] But the Supreme Court also has recognized that the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner.[21] Both written and oral expression may be subject to reasonable time, place, and manner restrictions.[22] Further, the Supreme Court has announced a two-tier approach, generally, for reviewing regulations on speech.

For the higher tier, "regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content," the Court applies "the most exacting scrutiny."[23] Such content-based regulations are presumptively invalid,[24] and they can withstand strict scrutiny only if precisely drawn to serve a compelling state interest.[25] For the lower tier, "regulations that are unrelated to the content of speech," the Court applies an "intermediate level of scrutiny."[26] Such content-neutral regulations are valid provided they are narrowly

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[19] *Cf. Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001).

[20] *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

[21] *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981).

[22] *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 (1984).

[23] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

[24] *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

[25] *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n*, 447 U.S. 530, 540 (1980).

[26] *Turner Broad. Sys., Inc.*, 512 U.S. at 642.

tailored to serve a substantial governmental interest,[27] and they do not unreasonably limit alternative channels for communicating the information.[28]

Determining which tier applies — i.e., whether a regulation is content neutral or content based — is often not a simple task. A content-neutral regulation generally must be both viewpoint neutral and subject-matter neutral.[29] As the Supreme Court has stated, "[r]egulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation."[30]

To be viewpoint neutral, a regulation must not be based on the message's ideology. For example, in *Boos v. Barry*, the Supreme Court declared unconstitutional a District of Columbia ordinance that prohibited displaying signs critical of a foreign government within 500 feet of that government's embassy.[31] The ordinance impermissibly distinguished between what signs were allowed and what signs were prohibited based on the viewpoint expressed.[32]

To be subject-matter neutral, a regulation must not be based on the speech's topic. For example, in *Carey v. Brown*,[33] the Supreme Court held unconstitutional an ordinance prohibiting all picketing in residential neighborhoods unless it was labor picketing connected to a place of employment. The Court explained that, though not restricting which view about labor may be expressed, the ordinance prohibited all speech

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[27] *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986); *Clark*, 468 U.S. at 293; *Taxpayers for Vincent*, 466 U.S. at 808; *Heffron*, 452 U.S. at 647-48.

[28] *City of Renton*, 475 U.S. at 47; *Clark*, 468 U.S. at 293; *Taxpayers for Vincent*, 466 U.S. at 808; *Heffron*, 452 U.S. at 647-48.

[29] *See, e.g., Hill v. Colorado*, 530 U.S. 703, 722-23 (2000).

[30] *Id.* at 723.

[31] 485 U.S. 312, 321 (1988).

[32] *Id.*

[33] 447 U.S. 455, 471 (1980).

except speech about the subject of labor.[34] Thus, the regulation was content based and impermissible.[35]

But the Supreme Court has indicated a willingness to treat some content-based regulations as content neutral if the regulations are motivated by a permissible content-neutral purpose. For example, in *City of Renton v. Playtime Theatres, Inc.*,[36] the Court upheld a zoning ordinance that kept adult movie theaters out of residential neighborhoods. The ordinance clearly was not subject-matter neutral, applying specifically to adult movie theaters. The Court nevertheless concluded that because the ordinance was aimed, not at the content of the films shown in the theaters, but rather at the "secondary effects" — such as crime and deteriorating property values — that such theaters fostered,[37] the "ordinance is completely consistent with [the] definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech.'"[38]

Although Barber contends that the Supreme Court's holding in *City of Renton* is limited to the adult theater context, we disagree. For example, the Supreme Court used the analysis from *City of Renton* in *Ward v. Rock Against Racism*.[39] In *Ward*, Rock Against Racism, an association "dedicated to the espousal and promotion of antiracist views,"[40] challenged the constitutionality of a city's volume-control guidelines. Those guidelines required all performers to use the city's sound equipment and sound technician for performances at a particular

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[34]*Id.* at 468.

[35]*Id.*

[36]475 U.S. at 48.

[37]*Id.* at 47-48.

[38]*Id.* at 48 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)) (emphasis in original).

[39]491 U.S. 781 (1989).

[40]*Id.* at 784.

park bandshell.[41] The Court noted that the principal justification for the guidelines was the city's desire to control noise levels and to avoid undue intrusion into residential areas and other areas of the park.[42]

In upholding the guidelines as content neutral, the Court in *Ward* explained:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . . The government's purpose is the controlling consideration.[43] Citing to *City of Renton*, the Court in *Ward* concluded:
>
> A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. . . . Government regulation of expressive activity is content neutral so long as it is "*justified* without reference to the content of the regulated speech."[44]

In *Boos v. Barry,*[45] the Court also looked to *City of Renton.* In *Boos*, the United States argued that an ordinance restricting speech critical of foreign governments near their embassies was justified based on an international law obligation to shield diplomats from speech that offends their dignity.[46] The Court, in declaring that part of the law unconstitutional, distinguished *City of Renton* because the ordinance restricting speech near embassies was:

> justified only by reference to the content of the speech.

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[41] *Id.* at 787.

[42] *Id.* at 792 (citation omitted).

[43] *Id.* at 791 (citations omitted).

[44] *Id.* (citations omitted) (emphasis in original).

[45] 485 U.S. at 320-21.

[46] *Id.* at 321.

> Respondents and the United States do not point to the "secondary effects" of picket signs in front of embassies. They do not point to congestion, to interference with ingress or egress, to visual clutter, or to the need to protect the security of embassies. Rather, they rely on the need to protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments. This justification focuses only on the content of the speech and the direct impact that speech has on its listeners.[47]

Other Supreme Court cases also provide guidance in determining whether a regulation is content based. For example, in *Metromedia, Inc. v. City of San Diego*,[48] a case relied upon by Barber and the court of appeals, the Court in a plurality opinion considered the constitutionality of a city's ordinance that imposed substantial prohibitions on erecting outdoor advertising displays within the city. The ordinance prohibited noncommercial signs, with certain limited exceptions, and offsite commercial signs, but allowed onsite commercial signs.[49] The Court upheld the ordinance in prohibiting offsite commercial messages, but declared it unconstitutional in prohibiting onsite noncommercial messages. Writing for the plurality, Justice White noted that, with respect to commercial messages:

> the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, [and] obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. The city has gone no further than necessary in seeking to meet its ends.[50]

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[47] *Id.*

[48] 453 U.S. 490, 493 (1981) (White, J., plurality opinion.).

[49] *Id.* at 513-15.

[50] *Id.* at 508.

But Justice White concluded that these same concerns did not warrant prohibiting billboards that contained noncommercial speech:

> The fact that the city may value commercial messages relating to onsite goods and services more than it values commercial communications relating to offsite goods and services does not justify prohibiting an occupant from displaying its own ideas or those of others. . . . There is a broad exception for onsite commercial advertisements, but there is no similar exception for noncommercial speech. The use of onsite billboards to carry commercial messages related to the commercial use of the premises is freely permitted, but the use of otherwise identical billboards to carry noncommercial messages is generally prohibited. . . . Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.[51]

The *Metromedia* plurality also expressed concern because the ordinance permitted only specified types of noncommercial signs in districts zoned as commercial or industrial.[52] But the ordinance allowed all types of commercial advertising in those same districts. This distinction prompted the plurality to state:

> Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests. . . . With respect to noncommercial speech,

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[51] *Id.* at 513.

[52] *Id.* at 514.

> the city may not choose the appropriate subjects for public discourse: "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." . . . Because some noncommercial messages may be conveyed on billboards throughout the commercial and industrial zones, San Diego must similarly allow billboards conveying other noncommercial messages throughout those zones.[53]

The plurality concluded that because the ordinance "reaches too far into the realm of protected speech . . . it is unconstitutional on its face."[54]

The concurring opinion in *Metromedia*, authored by Justice Brennan and joined by Justice Blackmun, concluded that "the *practical* effect of the San Diego ordinance [was] to eliminate the billboard as an effective medium of communication"[55] for noncommercial messages, and that the city had failed to make the strong showing needed to justify such "content-neutral prohibitions of particular media of communication."[56] The three dissenters also viewed the ordinance as tantamount to a blanket prohibition of billboards, but they would have upheld it because they did not perceive "even a hint of bias or censorship in the city's actions" nor "any reason to believe that the overall communications market in San Diego is inadequate."[57]

In *City of Cincinnati v. Discovery Network, Inc.*,[58] the Court declared unconstitutional an ordinance prohibiting newsracks on public property for distributing commercial

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[53] *Id.* at 514-15 (citations omitted).

[54] *Id.* at 521.

[55] Id. at 525 (Brennan, J., concurring) (emphasis in original).

[56] *Id.* at 526-27.

[57] *Id.* at 552-53 (Stevens, J., dissenting in part); *see id.* at 563, 566 (Burger, C.J., dissenting); *see also id.* at 569-70 (Rehnquist, J., dissenting).

[58] 507 U.S. 410, 412 (1993).

handbills. The city permitted newsracks that contained ordinary newspapers. The city argued that the ordinance was justified by concern over the secondary effects of such newsracks with regard to safety and aesthetics. But the Court rejected this argument, stating:

> Under the city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the ban in this case is "content based."[59]

The Court explained that "[i]n contrast to the speech at issue in [*City of*] *Renton*, there are no secondary effects attributable to ... newsracks [containing commercial handbills] that distinguish them from the newsracks [containing newspapers that the city] permits to remain on its sidewalks."[60]

Finally, in *City of Ladue v. Gilleo*,[61] the Court took a somewhat different approach in determining whether a city's ordinance that prohibited all signs within city limits, except those that fell within ten limited exemptions, was constitutional. Gilleo challenged the ordinance because it prohibited her from displaying a sign in the window of her home stating, "For Peace in the Gulf." In analyzing the ordinance, the Court noted that "[e]xemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place."[62]

In examining the city's "near-total" prohibition of residential signs, the Court assumed *arguendo* that the ordinance was free of impermissible content or viewpoint

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[59] *Id.* at 429.

[60] *Id.* at 430.

[61] 512 U.S. 43 (1994).

[62] *Id.* at 52.

discrimination.[63] Instead, the Court first asked whether the city could properly prohibit Gilleo from displaying an antiwar sign at her own home.[64] Then the Court stated that, only if necessary, would it consider whether it was improper for the city simultaneously to permit certain other signs.[65]

The Court focused on the fact that the ordinance affected residential property and concluded that the ordinance went too far in banning speech because it did not leave open adequate alternative channels of communication. The Court explained:

> In this case, we are not persuaded that adequate substitutes exist for the important medium of speech that Ladue has closed off.
>
> Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the "speaker." . . . [T]he identity of the speaker is an important component of many attempts to persuade. . . . A sign advocating "Peace in the Gulf" in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile.[66]

The Court also looked at the costs associated with communicating through an alternative forum and the intended audience of the communication. The Court stated:

> Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or

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[63] *Id.* at 53.

[64] *Id.*

[65] *Id.*

[66] *Id.* at 56 (citations and footnote omitted).

window sign may have no practical substitute. . . . Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a hand-held sign may make the difference between participating and not participating in some public debate. . . . Furthermore, a person who puts up a sign at her residence often intends to reach *neighbors*, an audience that could not be reached nearly as well by other means.[67]

In concluding that the ordinance violated the First Amendment, the Court emphasized the special status of speaking from one's own home:

> A special respect for individual liberty in the home has long been part of our culture and our law. . .; that principle has special resonance when the government seeks to constrain a person's ability to *speak* there. . . . Most Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8- by 11-inch sign expressing their political views. Whereas the government's need to mediate among various competing uses, including expressive ones, for public streets and facilities is constant and unavoidable, . . . its need to regulate temperate speech from the home is surely much less pressing.[68]

These cases provide a framework for analyzing whether the Texas Highway Beautification Act infringes upon Barber's First Amendment free speech rights. Recognizing that the Supreme Court took a somewhat different approach to analyzing speech regulation in *City of Ladue*, we think the Supreme Court's traditional analysis,[69] as the parties also advocate, applies here.

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[67] *Id.* at 57 (citations and footnote omitted) (emphasis in original).

[68] *Id.* at 58 (citations and footnote omitted) (emphasis in original).

[69] *See id.* at 59 (O'Connor, J., concurring).

Under that analysis, we first determine which tier applies — i.e., whether the Act is content based or content neutral. Then, based on the answer to that question, we apply the proper level of scrutiny.[70]

Initially, we note that no one argues that Barber's speech is anything other than noncommercial speech, even though those calling the telephone number on his sign would learn that Barber was an attorney. Accordingly, we assume that only noncommercial speech is at issue here. Barber denominates it as "political ideological speech," but we need not for purposes of our analysis differentiate between categories of noncommercial speech. In addition, we reject Barber's contention that because "political ideological speech" is at issue, the Texas Act automatically is subject to strict scrutiny. As the Supreme Court cases just discussed demonstrate, regulations involving noncommercial speech — which includes political and ideological speech — can be subject to intermediate scrutiny if they are content neutral.

In determining whether the Texas Act is content neutral, we recognize (and the parties concede) that the Act does not endorse any particular viewpoint. The Act, however, does make certain distinctions based on subject matter. For example, the Act exempts from regulation directional signs, signs pertaining to natural wonders or scenic or historic attractions, signs for the sale of property on which they are located, signs designed to protect life and property, and signs providing information about the location of utility lines.[71] The Act also exempts temporary signs relating to public elections and signs relating to activities conducted on the property where the signs are located.[72]

Barber focuses his argument primarily on the latter two exemptions. He contends that by prohibiting "ideological

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[70] *See id.*

[71] TEX. TRANS. CODE § 391.031(b).

[72] *Id.* § 391.005; *id.* § 391.031(b)(3).

political speech" but allowing "electoral political speech," i.e., temporary signs relating to public elections, the Texas Act regulates based on content. He also asserts that the Act favors commercial over noncommercial speech and favors some noncommercial speech (e.g., "electoral political speech") over other noncommercial speech (e.g., "ideological political speech").

The court of appeals, without expressly saying so, apparently agreed that the Act was content based.[73] Citing *Metromedia*, the court of appeals stated:

> The Act prohibits purely ideological speech in locations where it allows other types of speech, such as speech advertising onsite activities. . . . The Act would permit Barber to engage in commercial speech and some types of noncommercial speech on his property, but prohibits purely ideological speech. In effect, the Act bans purely ideological speech by Barber on his private property. This is ironic in that ideological speech enjoys the greatest protection under the United States Constitution. . . . The truth is that there is no commercial equivalent of Barber's purely ideological speech. . . . Therefore, without an exemption permitting ideological speech, commercial and noncommercial speech are not treated equally.[74]

We disagree with Barber's argument and the court of appeals' conclusion that the Act is content based. The Act defines "outdoor advertising" broadly. It includes both commercial and noncommercial speech, encompassing "advertising or information."[75] Further, the Act permits both types of speech in noncommercial and non-industrial areas as long as that speech relates to activities on the property. It also permits both types of speech in commercial and industrial areas,

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[73] *See* 49 S.W.3d at 24.

[74] *Id.* at 24, 25.

[75] TEX. TRANS. CODE § 391.001(10).

regardless of whether that speech relates to activities on the property. The dissent succumbs to Barber's argument by asserting that the Act "permits on-site commercial speech and *some* noncommercial speech," as if the Act allows all onsite commercial speech and more limited noncommercial speech.[76] But that is incorrect. As we have just said, the Act allows all onsite commercial speech and *all* onsite noncommercial speech.

These key factors distinguish the Texas Act from the ordinance in *Metromedia*. The ordinance in *Metromedia* only allowed onsite commercial signs, but prohibited other (offsite) commercial advertising and prohibited all noncommercial communications everywhere unless permitted by one of twelve exemptions.[77] As discussed, the Texas Act is different. The Texas Act permits commercial and noncommercial speech everywhere that relates to an activity on the property. In addition, it permits both types of speech in all commercial and industrial areas, even if the speech does not relate to an activity on the property. Therefore, the Texas Act does not run afoul of the concerns the plurality or concurrence expressed in *Metromedia*.

Although the parties make no mention of them in their briefing, we must note that TxDOT has adopted its own rules implementing the Act's provisions.[78] Under those rules, TxDOT considers an "on-premise" sign to be:

> a sign that refers to commercial activity or business located on the same property if the sign:
> (i) consists solely of the name of the establishment;
> (ii) identifies the establishment's principal product or services; or
> (iii) advertises the sale or lease of the property on which the sign is located.[79]

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[76] ___ S.W.3d ___ (emphasis added).

[77] *Metromedia, Inc.*, 453 U.S. at 494-96.

[78] *See, e.g.*, 43 TEX. ADMIN. CODE ch. 21, subch. I.

[79] *Id.* § 21.147(b)(1)(A).

By restricting "on-premise" signs to those relating to a commercial activity or business, TxDOT's rules do run afoul of the concerns expressed by *Metromedia*'s plurality and concurrence. But the restriction in TxDOT's rules is not supported by the Act's language, which defines "outdoor advertising" as something designed to "advertise or inform."[80] As we have discussed, that definition is broad enough to include both commercial and noncommercial speech. Because TxDOT's regulations are constitutionally suspect and do not comport with the Act's language, we decline to give them deference.[81]

Beyond this, the Texas Legislature did not adopt the Texas Highway Beautification Act because it disagreed with any messages that might otherwise be conveyed. Rather, the Legislature adopted the Act, in accordance with the Federal Highway Beautification Act, to control the secondary effects of billboards and signs along the interstate and primary highway system. Those effects include stemming visual clutter on the landscape, which the Legislature considered to be a public nuisance, and promoting travel safety.[82] Accordingly, the Act is also content neutral because it is "*justified* without reference to the content of the regulated speech."[83]

The Act's exemptions for temporary election signs on any property (both industrial and non-industrial) and for signs, other than temporary election signs, in noncommercial and non-industrial areas that relate to activities on the premises do not render the Act content based. We note that Barber is asserting only an as-applied challenge to the Act here, not a facial challenge, and the election sign exemption does not apply to Barber. It is the Act's general prohibition against billboards

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[80] TEX. TRANS. CODE § 391.001(10).

[81] *See In re Am. Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 490-91 (Tex. 2001).

[82] *See* TEX. TRANSP. CODE § 391.002(b)(1), (2); *id.* § 391.034(a).

[83] *See City of Renton*, 475 U.S. at 48 (quotation omitted) (emphasis in original).

that applies to Barber, which we have concluded is content neutral. Nevertheless, Barber relies on the election sign exemption to argue that the Act favors some noncommercial speech over other noncommercial speech. Barber also uses that exemption to argue that the Act fails the "secondary effects" test because TxDOT cannot prove that his "political ideological message" is more harmful than temporary election signs or signs advertising onsite activities. We disagree.

Though the election sign exemption is arguably content based, as the Supreme Court has stated, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."[84] Here, although Barber contends that elections are virtually "year-round" in Texas, the exemption allows signs for only a limited time period before and after the elections to which they pertain. And presumably for local elections, at least, such signs will be relegated to localized areas and will not be placed throughout the interstate and primary highway system. The exemption is consistent with the goal of minimizing "outdoor advertising" along this limited federal corridor.[85]

The exemption for signs relating to onsite activities likewise does not render the Act content based. We are persuaded in this regard by the Sixth Circuit's analysis of the Kentucky Billboard Act, also adopted in response to the Federal Highway Beautification Act, in *Wheeler v. Commissioner of Highways*.[86] In concluding that the Kentucky Act was constitutional, the Sixth Circuit stated that the Kentucky Act's exemptions, like those in the Texas Act:

> permit commercial and non-commercial signs in protected areas as long as the signs relate to an activity on the premises. Messages such as "Abortion is

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[84] *Ward*, 491 U.S. at 791.

[85] *Compare Discovery Network, Inc.*, 507 U.S. at 429.

[86] 822 F.2d 586 (6th Cir. 1987).

> Murder," or "No Nukes" are permissible if an activity related to the message is conducted on the premises. . . . [T]he Billboard Act and regulations apply evenhandedly to commercial and non-commercial speech; they discriminate against no viewpoint or subject matter.[87]

The Sixth Circuit also noted that the Kentucky Legislature enacted the Act, in part, "to preserve and enhance the natural scenic beauty or the aesthetic features of . . . interstate highways" and not "to prevent the citizens of Kentucky from receiving certain information."[88] Thus, the Sixth Circuit concluded:

> We believe that the Billboard Act and regulations are content neutral. They are not directed at the content of the messages, but at their secondary effects. . . .
>
> Furthermore, the on-premises/off-premises distinction does not constitute an impermissible regulation of content just because the determination of whether a sign is permitted at a given location is a function of the sign's message. Kentucky, by allowing persons who own or lease property, to have a sign, subject to size and space restrictions, advertising an activity conducted on the property is not favoring one message over another. The state has simply recognized that the right to advertise an activity conducted on-site is inherent in the ownership or lease of the property.[89]

We are also persuaded by the Eleventh Circuit's analysis in *Messer v. City of Douglasville*.[90] In *Messer*, the Eleventh Circuit held that a city ordinance allowing onsite noncommercial signs while denying offsite noncommercial signs was constitutionally permissible.[91] The Eleventh Circuit

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[87] *Id.* at 590.

[88] *Id.* at 591.

[89] *Id.* at 590, 591.

[90] 975 F.2d 1505 (11th Cir. 1992).

[91] *Id.* at 1509.

stated that the ordinance:

> ...regulates signs not based on the viewpoint of the speaker, but based on the location of the signs. There is no claim of bias, censorship or preference regarding a speaker's point of view. The ordinance does not favor commercial over non-commercial speech; neither does it favor non-commercial over commercial speech. . . . A noncommercial enterprise would be able to put up a sign bearing a noncommercial message as long as it relates to any activity on the premises. Similarly, a commercial enterprise would be able to put up a sign bearing a noncommercial message which related to any activity on the premises. For example, an auto mechanic's garage would be able to put up a noncommercial message relating to the recycling of used motor oil.[92]

Much like the regulations in *Wheeler* and *Messer*, the Texas Act's exemption for onsite activity does not favor commercial speech over noncommercial speech. It regulates signs based on their location. Therefore, the exemption does not render the Act content based.

Those cases from other jurisdictions suggesting otherwise are distinguishable.[93] For example, some involve ordinances that, unlike the Texas Act, allow only onsite noncommercial messages without allowing any offsite noncommercial messages.[94] The Texas Act, in contrast, permits any noncommercial message in industrial or commercial areas. Moreover, one case adopted a new test for determining

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[92] *Id.*

[93] *See, e.g., Ackerley Communications of Mass., Inc. v. City of Cambridge*, 88 F.3d 33, 37 (1st Cir. 1996); *Rappa v. New Castle County*, 18 F.3d 1043, 1063 (3d Cir. 1994); *Nat'l Adver. Co. v. City of Orange*, 861 F.2d 246, 247-48 (9th Cir. 1988); *John Donnelly & Sons v. Campbell*, 639 F.2d 6, 15 (1st Cir. 1980); *Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc.*, 467 S.E.2d 875, 879 (Ga. 1996).

[94] *E.g., Ackerley Communications of Mass., Inc.*, 88 F.3d at 37; *Nat'l Adver. Co.*, 861 F.2d at 247-48; *John Donnelly & Sons*, 639 F.2d at 15; *Union City Bd. of Zoning Appeals*, 467 S.E.2d at 879.

constitutionality that states:

> [W]hen there is a significant relationship between the content of particular speech and a specific location or its use, the state can exempt from a general ban speech having that content so long as the state did not make the distinction in an attempt to censor certain viewpoints or to control what issues are appropriate for public debate and so long as the exception also survives the test proposed by the *Metromedia* concurrence.[95]

Without deciding the merits of that test, we apply the traditional test developed from Supreme Court precedent for determining whether a regulation is content based. And under that test, the Texas Act is content neutral.

The dissent contends that *Discovery Network*'s rationale supports its conclusion that the Texas Act is not content neutral.[96] But *Discovery Network* is readily distinguishable from this case. In *Discovery Network*, an ordinance prohibited commercial handbills from being distributed in newsracks while allowing newspapers to be sold. Thus, the Court assumed that the ordinance completely prohibited what it characterized as "core" commercial speech while allowing other speech.[97] The Court concluded that, although the city asserted that an interest in aesthetics justified the ordinance, the ordinance did not limit the number of newsracks; it "limited (to zero) the number of newsracks *distributing commercial publications*."[98] Here, in contrast to the *Discovery Network* ordinance, the Texas Act does not completely prohibit either commercial or noncommercial speech. Rather, both types of speech are allowed without restriction in commercial and industrial areas. And both types of speech are allowed in noncommercial and

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[95] *See, e.g., Rappa*, 18 F.3d at 1065.

[96] ___ S.W.3d ___.

[97] *Discovery Network*, 507 U.S. at 424.

[98] *Id.* at 429 (emphasis in original).

non-industrial areas if the speech relates to an activity on the premises. In addition, as the dissent points out, the Texas Act allows directional signs to scenic or historic attractions and temporary election signs, under exemptions not applicable to Barber, even if they do not relate to activities onsite. And these exemptions, unlike the ordinance in *Discovery Network*,[99] do bear a direct relationship to the State's interest in promoting travel safety while minimizing the number of signs along a narrow federal corridor. *Discovery Network* is thus factually and legally distinguishable from this case, and its rationale does not govern here.

Because the Texas Act is content neutral, this puts us in the lower tier. In this tier, we must decide whether the Act is narrowly tailored to serve a substantial state interest.[100] The Act is primarily concerned with promoting aesthetics and travel safety by regulating the placement of billboards and signs. The parties do not dispute that the Act serves a substantial state interest. But regardless, aesthetics and public safety on the highway are recognized as substantial governmental goals.[101]

Barber argues that, despite serving substantial state interests, the Act is not narrowly tailored because it substantially overburdens political speech. According to Barber, the Act prohibits all political speech that is not related to an upcoming public election or to an activity carried out onsite. Barber is wrong.

As we have already discussed, the Act allows any type of noncommercial speech (including political and ideological speech) in industrial and commercial areas. The Act simply limits noncommercial speech in non-industrial and noncommercial areas to that which relates to an on-premise activity or to an upcoming public election. The Act similarly

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[99] *Id.* at 428.

[100] *City of Renton*, 475 U.S. at 47; *Clark*, 468 U.S. at 293; ; *Heffron*, 452 U.S. at 647-48.

[101] *See Taxpayers for Vincent*, 466 U.S. at 805; *Metromedia, Inc.*, 453 U.S. at 509; *Burns v. Barrett*, 561 A.2d 1378, 1382 (Conn. 1989).

limits commercial speech in those areas to onsite activities. Moreover, as we have also discussed, those limitations under the Act apply only along the interstate and primary highway systems and not elsewhere.

In *Taxpayers for Vincent*, the Supreme Court upheld a city ordinance that prohibited posting signs on public property.[102] A group that placed political campaign signs on utility poles challenged the ordinance.[103] The Court held that the ordinance was a valid time, place, and manner restriction that was narrowly tailored to address the city's legitimate interest in eliminating visual clutter.[104] Noting that "it is the tangible medium of expressing the message that has the adverse impact on the appearance of the landscape," the Supreme Court held that the ordinance was narrowly tailored because it "responds precisely to the substantive problem which legitimately concerns the City. [It] curtails no more speech than necessary to accomplish its purpose."[105]

Like the ordinance in *Taxpayers for Vincent*, the Texas Act precisely addresses the State's concerns with preserving scenic beauty and promoting public safety along interstate and federally-funded state highways. The Texas Act goes no further than necessary to serve those significant interests. The Act contains exemptions to accommodate as much speech as possible and still accomplish the goals of preserving the landscape and promoting travel safety. The Act is therefore sufficiently narrowly tailored to serve a substantial state interest.

To determine whether the Act constitutes a valid time, place, and manner restriction, however, we must also decide whether the Act leaves Barber with adequate alternative avenues for communication. Relying on *City of Ladue v.*

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[102]466 U.S. at 791.

[103]*Id.* at 792-93.

[104]*Id.* at 808-10.

[105]*Id.* at 810.

Gilleo,[106] Barber contends that the Act leaves him with no adequate substitute for the suppressed speech. The court of appeals agreed, stating:

> The sign on his property identifies Barber as the speaker. Erecting a sign on property he owns is comparatively cheap and convenient. It is probably the best means, and perhaps the only means, of reaching his intended audience — drivers on Interstate 20. The Act would only permit a comparable billboard in a commercial or industrial area, far from Barber's property. Other possible alternatives — hand-held signs, letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings — would be more expensive, less convenient, and poorly suited to reaching his intended audience, which is, by its nature, constantly changing.[107]

We disagree. Barber contends that the billboard identifies him as the speaker, because it is on his property in a rural area where everyone knows each other. At the same time, however, Barber argues that his targeted audience are those drivers on Interstate 20, passing by his property. Many of those drivers necessarily have no connection to Mitchell County, Texas, and would not know Barber, even if they called the telephone number on his billboard. Moreover, Barber does not reside on the property where his billboard was located, and that property is undeveloped land with no activities onsite. While a few local people may know that Barber owns that property, placing his billboard there does not add communicative value to his message for his targeted audience. Contrary to the dissent's views, we conclude that the special concerns the Supreme Court noted in *City of Ladue* about prohibiting an individual from displaying signs in the yards or windows of their homes do not

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[106]512 U.S. at 43.

[107]49 S.W.3d at 25.

apply here.

The dissent asserts that rural property owners that do not live on their property would be permitted to display a sign saying, "Watermelons for sale" if they erected a fruit stand on the property, but they would not be permitted to display a sign expressing their political views.[108] Thus, the dissent's example implicitly concedes our point by acknowledging that the sign "Watermelons for sale" would not be permitted on the property if no activity relating to that sign was conducted there. As well, the dissent must concede that rural property owners could display a sign expressing a political view if some activity was conducted on the property relating to the sign.

Further, in *City of Ladue*, the ordinance banned all signs like the one Gilleo wanted to display within city limits. In contrast, Barber admits that a sign identical to his could be placed in an industrial or commercial area. Although Barber asserts that he cannot afford to rent space for such a sign, we are again persuaded by the Sixth Circuit's analysis in *Wheeler* that this fact does not necessarily render alternative channels of communication inadequate.[109] In concluding that the Kentucky Billboard Act left open ample alternative channels for communication, the Sixth Circuit stated:

> [T]he Billboard Act and regulations leave open ample alternatives for communication of non-commercial and commercial messages. The prohibition against off-premises signs in the Billboard Act and regulations does not apply in areas zoned commercial or industrial prior to September 21, 1959. Signs unrelated to an on-premises activity are permitted in urban areas provided that the sign is located more than 660 feet from the interstate highway. Non-commercial and commercial messages are permitted anywhere provided that an activity relating to the message is conducted on the

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[108] ___ S.W.3d ___.

[109] 822 F.2d at 596.

> premises. Finally, the restrictions do not regulate the erection or maintenance of signs other than in areas near interstate or federal-aid primary highways. . . . Although the cost of erecting a sign may be greater in unprotected areas, the first amendment "requires only that [Kentucky] refrain from effectively denying [appellees] a reasonable opportunity to [erect a sign within Kentucky]." . . . The Billboard Act and regulations do not effectively deny appellees a reasonable opportunity to erect a sign with a religious or political message.[110]

Here too, the Texas Act does not effectively deny Barber a reasonable opportunity to convey his message to drivers along Interstate 20. Although the court of appeals stated that areas where he could post his message are far away from Barber's property, we find nothing in the record to support that conclusion. Moreover, although Barber contends that his message needs to be displayed on his property because that is where he allegedly witnessed constitutional violations, there also is nothing in the record to support that assertion.

Finally, Barber suggests that many other roadside signs in Mitchell County did not comply with the Act for years and that this demonstrates the Act was used in this case to suppress an unpopular message rather than to promote traffic safety or aesthetics. But Barber concedes that his billboard is not permitted under the Act. And Barber does not argue or cite any authority to establish the elements of a selective enforcement claim against TxDOT. We therefore do not address that question.

We conclude that the Texas Act is content neutral and constitutes a valid time, place, and manner restriction. It accordingly does not violate Barber's First Amendment rights. Because of this conclusion, we do not address TxDOT's other arguments that the court of appeals' judgment should be

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[110] *Id.* (citations omitted).

reversed.

B. The Texas Constitution's Article I, Section 8

Finally, we must consider whether the Act is unconstitutional under the Texas Constitution. Although Barber raised this issue in the court of appeals, that court did not resolve the question because it concluded that the Act violated Barber's federal constitutional rights. He raises that same issue here. Because we have concluded that the Act does not violate Barber's First Amendment rights, we address whether the Act violates Barber's rights under the Texas Constitution.

The Texas Constitution provides, in relevant part:

> Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. . . .[111]

In *Operation Rescue-National v. Planned Parenthood of Houston & Southeast Texas, Inc.*, this Court held:

> It is possible that Article I, Section 8 may be more protective of speech in some instances than the First Amendment, . . . but if it is, it must be because of the text, history, and purpose of the provision, not just simply *because*. Starting from the premise that the state constitutional provision *must* be more protective than its federal counterpart illegitimizes any effort to determine state constitutional standards. To define the protections of Article I, Section 8 simply as one notch above First Amendment protections is to deny state constitutional guarantees any principled moorings whatever. We reject this approach.[112]

And in *Ex Parte Tucci*, Chief Justice Phillips explored in his concurring opinion the history and adoption of Article I,

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[111] TEX. CONST. art. I, sec. 8.

[112] 975 S.W.2d 546, 559 (Tex. 1998) (footnote omitted) (emphasis in original).

section 8.[113] He concluded that when there is no prior restraint, "nothing in the language or purpose of [section 8] authorizes us to abandon the notion of accommodating competing interests . . . or even to afford greater weight in the balancing of interests to free expression than we would under the First Amendment . . . ."[114]

Here, Barber has not articulated any reasons based on the text, history, and purpose of Article I, section 8 to show that its protection of noncommercial speech is broader than that provided by the First Amendment under the circumstances presented. Accordingly, we decline to hold that the Texas Constitution affords Barber greater rights than does the First Amendment.

IV. CONCLUSION

The Texas Highway Beautification Act, as applied to Barber's billboard, does not impermissibly infringe upon Barber's free speech rights under the United States Constitution. The Act is content neutral and constitutes a valid time, place, and manner restriction. Nor has Barber shown that the Texas Constitution provides him greater protection than the federal constitution. We accordingly reverse the court of appeals' judgment and render judgment for TxDOT.

Craig T. Enoch
Justice

Opinion delivered: July 3, 2003

JUSTICE OWEN, joined by JUSTICE HECHT and JUSTICE SMITH, dissenting.

I respectfully dissent. I cannot readily distinguish the statute at issue in this case from the city ordinance at issue in

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[113] 859 S.W.2d 1, 16 (Tex. 1992) (plurality opinion) (Phillips, C.J., concurring).

[114] *Id.* at 32.

City of Ladue v. Gilleo.[1] The reasoning in that and other decisions of the United States Supreme Court that have dealt with restrictions on signage lead me to conclude that the Texas Highway Beautification Act is infirm.

I

The Court presumes that the sign at issue is not commercial speech, and the Texas Department of Transportation does not contend otherwise. I therefore presume that the speech at issue is noncommercial.

I question, though, whether the restrictions on speech that the Act imposes are content neutral. The Act permits on-site commercial speech and some noncommercial speech, but prohibits an owner of property from expressing a broad range of noncommercial speech. Neither the legislative history nor the record in this case suggests that the secondary effects of signs like Barber's distinguish them from speech that is permissible under the Act.

On rural property, the Act bans "outdoor advertising," which includes signs "designed, intended, or used to advertise or inform if any part of the advertising or information is visible from the main-traveled way of the interstate or primary system."[2] There are a number of exceptions to this ban, including a broad exemption for "outdoor advertising solely for activities conducted on the property on which it is located."[3] Other exceptions permit directional advertising for a natural wonder or scenic or historic attraction, signs indicating that the property is for sale or lease, signs that have the purpose of protecting life or property, historical markers,[4] and election signs for ninety days preceding an election and ten days thereafter.[5]

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[1]512 U.S. 43 (1994).

[2]TEX. TRANSP. CODE § 391.001(10).

[3]*Id.* § 391.031(b).

[4]*Id.*

[5]*Id.* § 391.005.

In *City of Cincinnati v. Discovery Network, Inc.*,[6] a city was "[m]otivated by its interest in the safety and attractive appearance of its streets and sidewalks" to ban commercial publications on freestanding newsracks located on public property.[7] Other newsracks containing newspapers were permitted. Two distributors of commercial publications challenged the ordinance. One of them, Discovery Network, had 38 newsracks through which about one-third of its magazines were distributed.[8] The magazines promoted adult educational, recreational, and social programs offered by Discovery Network, along with some information about current events of general interest.[9] The other distributor, Harmon Publishing, had 24 newsracks through which about 15% of its magazines were distributed.[10] These magazines contained real estate listings and photographs of residential property and some information about interest rates and other real estate matters.[11] Because the banned publications were commercial speech, the Court held that the City's burden was at least[12] "to establish a 'reasonable fit' between its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition of newsracks as the means chosen to serve those interests."[13] The City failed to meet this burden.

The Supreme Court's rationale in *Discovery Network* is instructive. The City's failure "to address its recently developed concern about newsracks by regulating their size, shape, appearance, or number indicates that it has not 'carefully

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[6]507 U.S. 410 (1993).

[7]*Id.* at 412.

[8]*Id.*

[9]*Id.*

[10]*Id.* at 413.

[11]*Id.* at 412-13.

[12]*Id.* at 416 n.11 (stating that the Court need not decide whether the City's policy should be subjected to more exacting review).

[13]*Id.* at 416.

calculated' the costs and benefits associated with the burden on speech imposed by its prohibition."[14] The Court characterized "the removal of 62 newsracks while about 1,500-2,000 remain[ed] in place" as "'minute'" and "'paltry,'" indicating the lack of "'fit'" between the City's goal and its method.[15]

The Supreme Court said the City's basis for discrimination had not been justified: "We accept the validity of the city's proposition, but consider it an insufficient justification for the discrimination against respondents' use of newsracks that are no more harmful than the permitted newsracks, and have only a minimal impact on the overall number of newsracks on the city's sidewalks."[16] The Court continued:

> Not only does Cincinnati's categorical ban on commercial newsracks place too much importance on the distinction between commercial and noncommercial speech, but in this case, the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city's admittedly legitimate interests.[17]

In the case before us today, I do not see how Barber's sign is any more harmful than the signs that are permitted by the Texas Act.

With regard to whether the Texas Act is content neutral, the United States Supreme Court said in *Discovery Network* that "government may impose reasonable restrictions on the time, place, or manner of engaging in protected speech provided that they are adequately justified '"without reference to the content of the regulated speech."'"[18] The Supreme Court held

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[14] *Id.* at 417.

[15] *Id.* at 418.

[16] *Id.*

[17] *Id.* at 424 (emphasis in original).

[18] *Id.* at 428 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984))).

that the restrictions in *Discovery Network* were not content neutral. The City had "enacted a sweeping ban on the use of newsracks that distribute 'commercial handbills,' but not 'newspapers.'"[19] Accordingly, "whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the ban in this case is 'content based.'"[20] The same is true of the Texas Act. Whether a sign is prohibited can only be determined by examining its content.

The secondary effects attributable to the newsracks at issue in *Discovery Network* did not distinguish them from permitted newsracks. The Supreme Court said: "In contrast to the speech at issue in *Renton*, there are no secondary effects attributable to respondent publishers' newsracks that distinguish them from the newsracks Cincinnati permits to remain on its sidewalks."[21] The secondary effects of noncommercial speech that is banned by the Texas Act are no greater or different than those of the speech that is permitted.

The ordinance in *Discovery Network* was neither content neutral nor narrowly tailored.[22] The Supreme Court held that "regardless of whether or not it leaves open ample alternative channels of communication, it cannot be justified as a legitimate time, place, or manner restriction . . . ."[23] And "because the ban is predicated on the content of the publications distributed by the subject newsracks, it is not a valid time, place, or manner restriction on protected speech."[24] The Texas Act, like the *Discovery Network* ordinance, is neither content

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[19] *Id.* at 429.

[20] *Id.*

[21] *Id.* at 430 (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)).

[22] *Id.*

[23] *Id.*

[24] *Id.*

neutral nor narrowly tailored, and therefore is not a valid time, place, or manner restriction on protected speech.

This Court incorrectly analyzes the reach of the Texas Act's ban in attempting to distinguish *Discovery Network*. The Court says that the Texas Act permits all commercial and noncommercial speech in rural areas as long as "the speech relates to an activity on the premises."[25] But the Act looks at the content of speech to determine whether signage that is unrelated to on-site activities is permitted. The Act permits "directional or other official outdoor advertising . . . pertaining to a natural wonder or a scenic or historic attraction."[26] This type of signage is not required to be on-site. Nor are election signs required to have anything to do with on-site activities. But election signs are permitted.[27]

This Court fails to apply the "commonsense" approach that *Discovery Network* applied in determining whether a ban on speech is content based. The ban imposed by the Texas Act is content based "by any commonsense understanding of the term"[28] because the content of speech must be examined to determine whether it relates to on-site activities or is otherwise permissible under the Act. Its content determines whether it is permitted or prohibited.

The Supreme Court also said in *Discovery Network*: "Cincinnati has enacted a sweeping ban that bars from its sidewalks a whole class of constitutionally protected speech."[29] The Texas Act contains a sweeping ban of *all* political speech, unless it relates to on-site activities or is contained in an election sign that is restricted by size and the dates on which it may be displayed. The Texas Act sweeps too broadly.

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[25] __ S.W.3d at __.

[26] TEX. TRANSP. CODE § 391.031(b).

[27] *Id.* § 391.005.

[28] 507 U.S. at 429.

[29] *Id.* at 430.

II

Even if the Texas Act were content neutral, the rationale of the United States Supreme Court in *City of Ladue*[30] leads me to conclude that the Texas Act does not pass constitutional muster. In *Ladue*, the Supreme Court assumed without deciding that the restrictions on speech in that case were not content based.[31] The Court nevertheless struck down the ordinance.[32] Applying the rationale articulated by a unanimous Court in *City of Ladue*, with JUSTICE O'CONNOR concurring only to raise questions about whether the Court should have assumed that the ordinance was not content based,[33] I am not prepared to say that the facts in this case distinguish it from *City of Ladue*.

In *City of Ladue*, the owner of a residence displayed an 8-inch by 11-inch sign in a window of her residence that said, "Say No to War in the Persian Gulf, Call Congress Now."[34] The sign at issue in the case before us today is larger than the sign at issue in *City of Ladue* and was erected on private property that was not the residence of the owner. But I cannot read the United States Supreme Court's decision so narrowly as to turn entirely on the size of the sign, or more importantly, whether the owner of private property resided on that property.

The stated purpose of the ordinance at issue in *City of Ladue* is similar to one of the purposes of the Texas Act at issue today. In *Ladue*, the Court noted:

> Thus, according to the Declaration of Findings, Policies, Interests, and Purposes supporting the ordinance, the permitted signs, unlike the prohibited signs, are unlikely to contribute to the dangers of "unlimited proliferation" associated with categories of

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[30]512 U.S. 43 (1994).

[31]*Id.* at 53.

[32]*Id.* at 58.

[33]*Id.* at 59.

[34]*Id.* at 45.

signs that are not inherently limited in number.[35]

The Court in *Ladue* said that the exemptions in the ordinance at issue in that case shed light on whether too much speech was prohibited and diminished the credibility of the government's rationale for restricting some types of speech but not others:

> Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place. . . . In this case, at the very least, the exemptions from Ladue's ordinance demonstrate that Ladue has concluded that the interest in allowing certain messages to be conveyed by means of residential signs outweighs the City's esthetic interest in eliminating outdoor signs. Ladue has not imposed a flat ban on signs because it has determined that at least some of them are too vital to be banned.[36]

The credibility of the Texas Act is diminished by the exemptions that it permits. The exemptions in *City of Ladue* were not enough, however, standing alone, to persuade the Supreme Court that the prohibition at issue was unconstitutional. The Court said that it would first "ask whether Ladue may properly *prohibit* [the property owner] from displaying her sign, and then, only if necessary, consider the separate question whether it was improper for the City simultaneously to *permit* certain other signs."[37]

The Supreme Court noted that Ladue's ordinance, like the Texas Act, "covers even such absolutely pivotal speech as a sign protesting an imminent governmental decision to go to

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[35] *Id.* at 52.

[36] *Id.* at 52-53.

[37] *Id.* at 53 (emphasis in original).

war."[38] And, the Ladue ordinance, like the Texas Act, foreclosed a "venerable means" of communication, which is displaying a sign on private property expressing the owner's political views:

> Ladue has almost completely foreclosed a venerable means of communication that is both unique and important. It has totally foreclosed that medium to political, religious, or personal messages. Signs that react to a local happening or express a view on a controversial issue both reflect and animate change in the life of a community. Often placed on lawns or in windows, residential signs play an important part in political campaigns, during which they are displayed to signal the resident's support for particular candidates, parties, or causes. They may not afford the same opportunities for conveying complex ideas as do other media, but residential signs have long been an important and distinct medium of expression.[39]

The Supreme Court then noted that "[o]ur prior decisions have voiced particular concern with laws that foreclose an entire medium of expression," and that "by eliminating a common means of speaking, such measures can suppress too much speech."[40] Placing a sign on one's own property is a common means of speaking, even if the property is not the owner's residence.

The City of Ladue argued, like the State argues in this case, that it was merely regulating the time, place and manner of speech, and the property owner remained free to communicate by other means.[41] The Supreme Court was unpersuaded: "[W]e are not persuaded that adequate substitutes exist for the

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[38] *Id.* at 54.

[39] *Id.* at 54-55.

[40] *Id.* at 55.

[41] *Id.* at 56.

important medium of speech that Ladue has closed off."[42] Similarly, the Supreme Court said in *Discovery Network* that "even if we assume, arguendo, that the city might entirely prohibit the use of newsracks on public property, as long as this avenue of communication remains open, these devices continue to play a significant role in the dissemination of protected speech."[43] Signs on private property expressing the owner's viewpoint play a significant role in the dissemination of protected speech.

In *City of Ladue*, the Supreme Court discussed the unique impact that a small residential sign could have and noted that residential signs are "an unusually cheap and convenient form of communication."[44] But the Court also recognized that even for those of means, the cost of taking out a newspaper advertisement or handing out leaflets "may make the difference between participating and not participating in some public debate."[45] The Supreme Court said:

> Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a handheld sign may make the difference between participating and not participating in some public debate. Furthermore, a person who puts up a sign at her residence often intends to reach *neighbors*, an audience that could not be reached nearly as well by other means.[46]

In the case before us today, the Court distinguishes *City of Ladue* in part on the basis that Barber was attempting to reach those traveling on a highway rather than residents in a

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[42] *Id.*

[43] 507 U.S. 410, 427-28 (1993).

[44] *City of Ladue*, 512 U.S. at 57.

[45] *Id.*

[46] *Id.* (emphasis in original).

neighborhood.[47] But I cannot read the decision in *Ladue* so narrowly. Barber could not express his views about the searches occurring on the highway "nearly as well by other means."[48] As the United States Supreme Court said: "The elimination of a cheap and handy medium of expression is especially apt to deter *individuals* from communicating their views to the public, for unlike businesses (and even political organizations) individuals generally realize few tangible benefits from such communication."[49]

Barber is an attorney, and the content of his sign could arguably lead clients who had been subjected to a search to retain him. But again, the State has not contended that the speech at issue was commercial, and if Barber's sign had contained other speech, such as: "Protect a woman's right to choose, make your voice heard," or: "A child is created at conception," or encouraging a visit to a place of worship of a particular faith or denomination, such a sign would have been unlawful under the Act.

The United States Supreme Court did emphasize in *City of Ladue* that "[a] special respect for individual liberty in the home has long been a part of our culture and our law," and that "[m]ost Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8-inch by 11-inch sign expressing their political views."[50] But I think that owners of rural property, even if they do not live on the property, would be dismayed to learn that they cannot place even a single sign on that property expressing their political views, although they would be permitted to display a sign that said, "Watermelons for sale" if they erected a fruit stand on the property. Preserving scenic beauty and promoting public safety are legitimate aims, but the State could

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[47] ___ S.W.3d at ___.

[48] *City of Ladue*, 512 U.S. at 57.

[49] *Id.* at n.15 (emphasis in original).

[50] *Id.* at 58.

have limited the number or density of signs that an owner may display on property abutting highways and achieved the same end. Or the State could have regulated the size of signage, as it has done with election signs that are permitted.[51] Instead, it prohibited a broad range of noncommercial speech while permitting other noncommercial and commercial speech, and during certain times of the year, other political speech. The Texas Act permits some political speech, such as election signs, but broadly bans all other political speech and a broad range of other noncommercial signage, unless it relates to an on-site activity. The distinctions drawn by the Act are not justified by its laudable purposes.

Accordingly, I must dissent.

Priscilla R. Owen
Justice

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[51] *See* TEX. TRANSP. CODE § 391.005 (limiting the surface area of election signs to 50 square feet).

APPENDIX B

TEXAS COURT OF APPEALS,
THIRD DISTRICT, AT AUSTIN
NO. 03-00-00373-CV

Pat Barber, Appellant
v.
Texas Department of Transportation; Charles W. Heald, P.E., Executive Director of Texas Department of Transportation, in his Official Capacity; John P. Campbell, P.E., Director, Right-Of-Way Division, Texas Department of Transportation, in his Official Capacity; Bill Hale, P.E., Abilene District Engineer, Texas Department of Transportation, in his Official Capacity; Alvin Luedecke, Jr., P.E., Director of Transportation, Planning and Program, Texas Department of Transportation, in his Official Capacity; and John Cornyn, Attorney General of Texas, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY,
201ST JUDICIAL DISTRICT
NO. 98-09717, HONORABLE MARY PEARL WILLIAMS,
JUDGE PRESIDING

Pat Barber filed suit in Travis County District Court seeking a declaratory judgment that the Texas Highway Beautification Act ("the Texas HBA" or "the Act") was an unconstitutional infringement on his right to free speech under the federal and state constitutions. Barber also sought an injunction prohibiting enforcement of the Act by the Texas Department of Transportation, various officials within the Department, and the Attorney General of Texas (collectively "TxDOT"). TxDOT's motion for summary judgment was granted and the trial court ordered that Barber was permanently enjoined from displaying an outdoor advertising sign on his

private property in Mitchell County, Texas. Furthermore, Barber was ordered to pay court costs and TxDOT's reasonable attorneys' fees of $1200. Barber appeals. We will reverse and render judgment regarding the declaratory judgment and injunction. We will reverse and remand regarding costs and attorneys' fees.

BACKGROUND

Barber erected a sign on his private property adjoining Interstate 20, near Colorado City, Texas. The sign read "Just Say NO to Searches" and displayed a phone number. Callers dialing the number reached an answering machine that played the following two-minute message about a citizen's constitutional rights regarding searches:

> This recorded information is provided as a public service by Pat Barber's Law Office in regard to the large number of unreasonable searches being pursued by state officers on the highway. Officers are relying on people's ignorance of their right to search.
>
> Many people are being intimidated; often, when an officer has asked for a search and is refused, the officer will threaten to obtain a warrant from a judge. This threat is a bluff because most of the time the officer doesn't have probable cause. When an officer threatens to get a warrant and knows he doesn't have probable cause, he is intimidating the citizen through deception. Most people don't know that an officer can't get a warrant to search unless he proves to a judge that probable cause of a criminal offense exists.
>
> An innocent citizen may have nothing to hide, but has done nothing wrong, and should know that when an unreasonable search request is refused, the officer must let him go.
>
> When an officer has permission to search, the vehicle may be taken apart and the contents are thrown on the ground so the drug dogs can work.
>
> I know about one lady traveling in a late model Suburban who was seen standing by the side of the road trying to

hold her hair together in a twenty-mile-per-hour wind while officers threw her possessions on the ground. After the officers finished the search and left, a local citizen stopped and helped her pick up her things.

I am offended by this kind of police behavior, and I feel a duty to inform citizens about their rights. Just say NO to searches... it's your constitutional right. If you would like to leave a message, please wait for the beep. Good luck and have a safe trip.

Although located on his private property, Barber's sign was within the corridor along Interstate 20 that is regulated by the Act. The area is not commercial or industrial; therefore, all signs must qualify for an exemption expressly provided by the Act. Barber's sign did not qualify for any exemption. Furthermore, he did not apply for a license or permit prior to erecting the sign as required by the Act. Barber received a letter from TxDOT stating that his sign violated the Act. The letter demanded that Barber comply with the Act or remove the sign. Barber filed suit against TxDOT in Travis County District Court requesting a temporary injunction, declaratory judgment, and permanent injunction. After a hearing, the district court issued a temporary injunction, prohibiting TxDOT from enforcing the Act against Barber pending a trial on the merits.

Both parties filed motions for summary judgment regarding Barber's claim that the Act was being applied in an unconstitutional manner. After a hearing, the trial court granted partial summary judgment in favor of TxDOT. Subsequently, there was a hearing on TxDOT's counterclaim, seeking removal of the sign. The trial court granted summary judgment, again in favor of TxDOT. Barber was permanently enjoined from displaying the sign and ordered to pay all costs and TxDOT's reasonable attorneys' fees of $1200. Barber removed the sign and filed his notice of appeal.

THE TEXAS HIGHWAY BEAUTIFICATION ACT

This case is about the constitutionality of the Texas HBA. Like similar statutes in other states, the Texas HBA was enacted in response to the federal Highway Beautification Act of 1965.

See Tex. Transp. Code Ann. § 391.002(a) (West 1999); 23 U.S.C.A. §§ 131, 136 (West 1990 & Supp. 2000). The federal act requires states to control outdoor advertising signs along interstate and primary highways or suffer a reduction of ten percent in their federal-aid highway funds. 23 U.S.C.A. § 131(b) (West 1990). The federal HBA specifies the minimum standards that the states must enforce to avoid the loss of federal monies, but authorizes the states to enact stricter standards. *Id.* § 131(k).

Chapter 391 of the Texas Transportation Code is entitled Highway Beautification on Interstate and Primary Systems. Tex. Transp. Code Ann. §§ 391.001-.213 (West 1999 & Supp. 2001). The purposes of the Act are to promote the safety of the traveling public and to protect the esthetic beauty of the Texas landscape. *Id.* § 391.002(b)(1), (c)(2) (West 1999). The Act dictates that it is a misdemeanor to erect any outdoor advertising[1] that is visible from the interstate, either (1) within 660 feet of the right-of-way; or (2) outside an urban area, more than 660 feet from the right-of-way, if the sign is erected for the purpose of having its message seen from the interstate. *Id.* § 391.031(a), (d). It is not an offense to erect the following types of signs, regardless of their proximity to rights-of-way: directional; pertaining to natural wonders, or scenic or historic attractions; advertising the sale or lease of the property on which the sign is located; advertising activities conducted on the property on which the sign is located; for the protection of life and property; or signs that are historic or artistic landmarks. *Id.* § 391.031(b)(1)-(3), (5), (6). It is not an offense to erect any type of sign within areas of industrial or commercial land use. *Id.* § 391.031(b)(4). Temporary signs relating to public elections and measuring less than fifty square feet are exempt from regulation under the Act. *Id.* § 391.005. Prior to erecting any outdoor advertising sign, a person must acquire a license and a permit from the Texas Transportation Commission.[2] *Id.* §§ 391.061(a), .067(a). In order to qualify for a license, the applicant must file an application and surety bond, and pay a fee. *Id.* § 391.062(a). Erecting a sign without a

license is a misdemeanor punishable by a fine of $500 to $1000 per day. *Id.* § 391.061(b). In order to qualify for a permit, the applicant must possess a license, file an application, and pay a fee. *Id.* § 391.068(a)(1), (b). Permits are only issued for advertising that complies with the Act and with Commission rules. *Id.* §§ 391.068(a)(2), .032(a). Erecting a sign without a permit is a misdemeanor punishable by a fine of $500 to $1000 per day. *Id.* § 391.067(b).

The legislature has declared that outdoor advertising erected in violation of the Act "endangers the health, safety, welfare, morals, convenience, and enjoyment of the traveling public and the protection of the public investment in the interstate and primary highway systems" and is a public nuisance. *Id.* § 391.034(a). On written notice from TxDOT, the owner of outdoor advertising that violates the Act has forty-five days to remove it. *Id.* § 391.034(b). If the owner does not remove the sign, TxDOT can direct that the attorney general initiate legal action seeking: (1) an injunction prohibiting maintenance of the sign; (2) an injunction requiring removal of the sign; (3) all administrative and legal costs incurred to remove the sign; and (4) a civil penalty of $500 to $1000 per day. *Id.* §§ 391.034(b), (c), .035(a), (b).

DISCUSSION

A. The Standard of Review

The material facts of this case are not in dispute. Because the propriety of the summary judgment is a question of law, we review the trial court's decision *de novo*. *Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 699 (Tex. 1994). When both sides move for summary judgment and the trial court grants one motion and denies the other, we review the summary-judgment proof presented by both sides and determine all questions presented. *Comm'rs Court v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997). If we find error, we must render the judgment that the trial court should have rendered. *Id.*

B. The Issue on Appeal

The issue in this appeal is whether the state can prohibit Barber from engaging in purely ideological speech on his own

private property. We hold that this prohibition is a violation of Barber's free speech rights guaranteed by the First Amendment to the United States Constitution.[3]

C. Property Rights

The Texas HBA regulates a corridor along federally funded interstate highways. In essence, the state is taking a sight easement across private property to ensure open, billboard-free space alongside the interstate.[4] However, Barber does not allege a taking without just compensation in violation of the Fifth Amendment and the parties cite no cases on this issue.[5] Some of the cases cited by the parties concern whether the federal or state statutes provide enough exemptions to pass muster under a First Amendment free speech analysis. *Rappa v. New Castle County*, 18 F.3d 1043, 1047 (3d Cir. 1994); *John Donnelly & Sons v. Campbell*, 639 F.2d 6, 8-9 (1st Cir. 1980), *summarily aff'd*, 453 U.S. 916 (1981). Most of the First Amendment cases cited by the parties are distinguishable in that they do not involve an individual, private-property owner who is prohibited from engaging in noncommercial, ideological speech *on his own property*. *See generally City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 43 (1986) (concerning zoning prohibiting adult movie theaters in residential zones); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 493 (1981) (concerning billboard companies' challenge to city ordinance); *Thornhill v. Alabama*, 310 U.S. 88, 91 (1940) (concerning statute prohibiting all picketing); *Ex parte Tucci*, 859 S.W.2d 1, 3 (Tex. 1993) (concerning injunction creating speech-free zone around clinics); *Davenport v. Garcia*, 834 S.W.2d 4, 6 (Tex. 1992) (concerning gag order restricting lawyers, guardians ad litem, and clients from discussing civil litigation); *but see City of Ladue v. Gilleo*, 512 U.S. 43, 45 (1994) (concerning city ordinance effecting total ban on residential signs with political, religious, or personal messages).

Property rights are not created by the Constitution, but by independent sources, such as state law. *Delaware v. New York*, 507 U.S. 490, 501-02 (1993). In Texas, property rights are considered "sacred and fundamental." *State v. Texas City*, 295

S.W.2d 697, 704 (Tex. Civ. App.-Galveston 1956), *aff'd*, 303 S.W.2d 780 (Tex. 1957); *Ford v. Grand United Order of Odd Fellows*, 50 S.W.2d 856, 859 (Tex. Civ. App.-Beaumont 1932, writ dism'd w.o.j.) ("right to own and have exclusive dominion over private property is a sacred one"). The ownership of property is defined not merely as the right to own and possess the chattel or the land, but to use, enjoy, and dispose of it as one sees fit. *Spann v. City of Dallas*, 235 S.W. 513, 514 (Tex. 1921); *Gen. Tire & Rubber Co. v. Tex. Pac. Coal & Oil Co.*, 102 S.W.2d 1086, 1090 (Tex. Civ. App.-Fort Worth 1937, writ ref'd); *Stone v. Kendall*, 268 S.W. 759, 761 (Tex. Civ. App.-Waco 1925, no writ). The Texas Supreme Court has elaborated as follows:

> The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right. Therefore a law which forbids the use of a certain kind of property, strips it of an essential attribute and in actual result proscribes its ownership.
>
> . . . The right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right. It does not owe its origin to constitutions. It existed before them. It is a part of the citizen's natural liberty-an expression of his freedom, guaranteed as inviolate by every American Bill of Rights. *Spann*, 235 S.W. at 514-15.

Of course, the rights of private property owners are not absolute. They are subject to some restrictions, for example, zoning laws. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *Brehmer v. City of Kerrville*, 320 S.W.2d 193, 196 (Tex. Civ. App.-San Antonio 1959, no writ); *City of Lubbock v. Stubbs*, 278 S.W.2d 519, 523 (Tex. Civ. App.-Amarillo 1954, writ ref'd n.r.e.). However, any exercise of the state's police power to restrict the right to use one's property must bear a reasonable relationship to the public health, safety, morals, or welfare. *Village of Euclid*, 272 U.S. at 395; *Brehmer*, 320 S.W.2d at 196; *City of Lubbock*, 278 S.W.2d at 523; *City of Texarkana v. Mabry*, 94 S.W.2d 871, 874 (Tex. Civ. App.-

Texarkana 1936, writ dism'd w.o.j.). Restrictions on property use that do not bear a reasonable relationship to the public welfare are arbitrary and unreasonable, and thus unconstitutional. *Village of Euclid*, 272 U.S. at 395.

The Texas HBA restricts the right to use private property. As such, the Act must bear a reasonable relationship to the public health, safety, morals, or welfare. *See id.*; *Brehmer*, 320 S.W.2d at 196; *City of Lubbock*, 278 S.W.2d at 523; *Mabry*, 94 S.W.2d at 874.

D. The First Amendment

The initial step in First Amendment analysis is to determine whether a statute is content-neutral or content-based. *Rappa*, 18 F.3d at 1043; *see also Boos v. Barry*, 485 U.S. 312, 318-19 (1988) (striking content-based statute that prohibited picket signs critical of foreign governments); *Id.* at 320 (stating that statutes are content-neutral when justified without reference to content of regulated speech). This determination is more complex than it may appear. Statutes that regulate speech based on the direct impact on the audience are content-based. *Id.* at 321 (striking content-based regulation that was justified only by need to protect dignity of foreign diplomatic personnel by shielding them from speech critical of their governments). However, a regulation that prohibits speech by reference to its type, category, or characteristics (in essence, its *content*) may be *content-neutral* if the regulation is aimed only at curbing the secondary effects of the speech and not at suppression of a particular message. *See City of Renton*, 475 U.S. at 47. For example, in *Renton*, the city's zoning ordinance prohibited sexually oriented theaters within 1000 feet of residential neighborhoods, churches, parks, or schools. The Supreme Court noted that although the city's zoning ordinance treated adult movie theaters differently from other kinds of theaters, the regulation was not aimed at suppressing the content of the films or preventing psychological damage to viewers. To the contrary, the regulation was predominately aimed at the prevention of crime, protection of retail trade, maintenance of property values, and preservation of the quality of residential neighborhoods. *Id.*

at 48. The city ordinance was analyzed as a content-neutral regulation and upheld. *Id.* at 55. Whether a regulation is content-based or content-neutral determines the analytical framework for deciding whether it infringes on First Amendment free speech rights.

If a statute is content-based, it is subjected to strict scrutiny. The state is required "to show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Boos*, 485 U.S. at 321 (citation omitted). If the statute is content-neutral, reasonably regulating the time, place, and manner of permitted speech, it must be narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication of the information. *Rappa*, 18 F.3d at 1054. The parties have devoted a good deal of their respective arguments to the issue of whether the Act is content-based or content-neutral. A review of the primary cases they cite reveals the complexity of this issue.

1. The United States Supreme Court's *Metromedia* Opinion

The City of San Diego prohibited outdoor advertising display signs (1) identifying a use, facility, or service not located on the premises; (2) identifying a product not produced, sold, or manufactured on the premises; or (3) directing attention to a product, service, activity, event, person, institution, or business generally conducted, sold, manufactured, produced, or offered elsewhere than on the premises where the sign was located. *Metromedia*, 453 U.S. at 494. The city ordinance provided exemptions for onsite signs and twelve specific categories of signs.[6] Appellants were the owners of billboards located on land that they leased in commercial and industrial areas. Space on the signs was leased to any interested party and messages changed frequently. *Id.* at 496.

Justice White authored the plurality opinion, in which three justices joined. He used a bifurcated approach in which he analyzed the ordinance's effect on commercial and noncommercial speech separately. First, he observed that the regulation permitted signs advertising commercial goods and

services provided onsite, while prohibiting advertising for goods and services provided offsite. The following factors led to his conclusion that the city's regulation of commercial signs was constitutional: (1) the prohibition of offsite advertising was directly related to the city's substantial interests in safety and esthetics; (2) periodically changing offsite signs might threaten safety and esthetics more than onsite signs, which changed infrequently; and (3) the city could reasonably conclude that the interests of onsite advertisers outweighed the city's interests in safety and esthetics, while the interests of offsite advertisers did not. *Id.* at 511-12.

Next, Justice White analyzed the ordinance's effect on noncommercial advertising. He determined that noncommercial advertising was prohibited offsite *and onsite*, unless within one of the specific exemptions (for example, for sale signs, religious symbols, or commemorative historical plaques). *Id.* at 503. Justice White rejected the argument that the ordinance was a content-neutral regulation of reasonable time, place, and manner, because "[i]t is apparent . . . that the ordinance distinguishes in several ways between permissible and impermissible signs at a particular location by reference to their content." *Id.* at 516. The plurality declared the ordinance unconstitutional on its face after making the following observation: Although there was no evidence that noncommercial billboards posed a greater threat to safety or esthetics, the ordinance prohibited noncommercial billboards in locations where it allowed commercial billboards. *Id.* at 513. On this issue, the plurality spoke approvingly of *John Donnelly & Sons*, and stated that "[o]ther courts, however, have failed to give adequate weight to the distinction between commercial and noncommercial speech and to the higher level of protection to be afforded the latter." *Id.* at 513 n.18 (citations omitted). Since the city permitted some noncommercial messages, it had to allow others, because it did not have the authority to choose the appropriate topics for public discourse. *Id.* at 514-15. Therefore, the case was remanded to the California Supreme Court for determination of whether the ordinance could be

constitutionally sustained by limiting its application to commercial speech only. *Id.* at 521 & n.26.

Justice Brennan concurred in the judgment, joined by one other justice, but took issue with the plurality opinion in several regards. First, he asserted that the bifurcated treatment of commercial and noncommercial speech was analytically flawed and a departure from precedent. *Id.* at 534. Contrary to the plurality's interpretation of the ordinance, Justice Brennan read the ordinance as a *total ban* on commercial and noncommercial outdoor advertising, notwithstanding a few limited exemptions. *Id.* at 522-23. He concluded that the onsite exemption would allow noncommercial speech, such as the identification of a political campaign headquarters or a public interest group. *Id.* at 535-36. Justice Brennan challenged the plurality view that perhaps the ordinance could be sustained if applied solely to commercial speech, because that would vest government officials with the discretion to decide whether proposed speech was commercial or noncommercial in the first instance. *Id.* at 536-37.

The concurrence therefore analyzed the ordinance as a time, place, and manner regulation under the content-neutral framework. Justice Brennan stated the test thusly:

> In the case of billboards, I would hold that a city may totally ban them if it can show that a sufficiently substantial governmental interest is directly furthered by the total ban, and that any more narrowly drawn restriction, *i.e.*, anything less than a total ban, would promote less well the achievement of that goal.

Id. at 528. For the following reasons, Justice Brennan found that the ordinance failed this test. Although traffic safety was a substantial governmental interest, there was no evidence that billboards impaired traffic safety. *Id.* The ordinance was not narrowly drawn because it prohibited some billboards that would not even be visible from the street. *Id.* at 528-30. Finally, the city failed to demonstrate that its interest in esthetics in commercial and industrial areas was sufficiently substantial. *Id.* at 530.

Justice Stevens dissented in part. Based on the parties' stipulation that the ordinance would eliminate all offsite billboard advertising and an absence of evidence that the ordinance would impact onsite advertising, Justice Stevens stated that the appellants did not have standing "to assert the purely hypothetical claims of property owners whose onsite advertising is entirely unaffected by the application of the ordinance." *Id.* at 544. Rather, he focused on whether the city could "entirely ban" offsite advertising. *Id.* at 542. Justice Stevens answered this question affirmatively after observing that there was no evidence of censorship by the city and that the overall communications market in San Diego was adequate. *Id.* at 552. Finally, Justice Stevens found that the exemptions to the ban were content-neutral. They did not indicate any attempt by the city to influence or limit public debate on particular issues. *Id.* at 554 & n.25.

Chief Justice Burger's dissent stated that it was "not really relevant" whether the ordinance was a time, place, and manner regulation or a total ban with content-based exemptions. *Id.* at 557. The Court's duty was to determine whether the ordinance was neutral toward the messages conveyed and whether it left open other adequate means of conveying those messages. *Id.* at 561. The Chief Justice found that the ordinance was not discriminatory toward any viewpoint or subject, the exemptions were not an attempt at censorship, and application of the exemptions did not require the exercise of discretion by government officials. *Id.* at 565-66. Finally, the Chief Justice stated that permitting commercial speech where noncommercial speech was prohibited did not run afoul of the Constitution. To the contrary, it reflected the city's recognition that it was at liberty to regulate commercial speech in ways that it could not regulate noncommercial speech. *Id.* at 568. Because the city could not, constitutionally, evaluate, classify, and regulate noncommercial speech, it correctly treated all noncommercial speech the same. *Id.* at 569.

In his brief dissent, Justice Rehnquist described the Court's treatment of the ordinance as "a virtual Tower of Babel." *Id.* He

stated that the governmental interest in esthetics was sufficient to justify a total prohibition of billboards in any community and the exemptions within the ordinance did not render it unconstitutional. *Id.* at 570.

2. John Donnelly & Sons v. Campbell

TxDOT cites *John Donnelly & Sons*, in which the United States Court of Appeals for the First Circuit reviewed a challenge to the Maine Traveler Information Services Act on First Amendment grounds. *John Donnelly & Sons*, 639 F.2d at 6-7. Two billboard companies appealed after the district court dismissed their suit against the state. The First Circuit found that the ban on billboards was content-neutral. *Id.* at 8. Billboards were not banned due to their content, but because the medium of communication was objectionable. The ten exemptions from the regulation reflected appropriate governmental interests and did not "change the statute from a time, place and manner restriction to one impermissibly based on content." *Id.* at 9. Next, the court found that the statute was narrowly drawn to advance the state's interests in esthetics and tourism. *Id.* at 12. In regard to commercial speech, the court concluded that there were ample alternative means of communication. *Id.* at 13-14.

TxDOT, however, fails to note that following this favorable analysis of the statute, the majority ultimately held it unconstitutional because "[t]here is more involved here . . . than commercial advertising." *Id.* at 15. The court observed that although the statute contained ten exemptions, there were none for "signs on important public issues as to which no referendum is pending." *Id.* These signs were effectively banned, without ample alternative means of communication, meaning that the statute impacted more heavily on ideological speech than on commercial speech, in contravention of the First Amendment. *Id.* at 15-16. Consequently, the First Circuit reversed and remanded the case to the trial court for entry of judgment in favor of the billboard companies. *Id.* at 16.

3. *Wheeler v. Commissioner of Highways*

TxDOT also relies on *Wheeler*, in which the United States

Court of Appeals for the Sixth Circuit upheld Kentucky's version of the Highway Beautification Act as content-neutral and narrowly tailored to serve substantial state interests. *Wheeler v. Comm'r of Highways*, 822 F.2d 586, 587 (6th Cir. 1987). In *Wheeler*, the court found that the statute did not discriminate against any particular viewpoint, subject or category of speech, but was instead directed at the secondary effects of billboards. *Id.* at 590. The court distinguished the Kentucky Billboard Act from the ordinance challenged in *Metromedia*. *Id.* at 593. The Kentucky statute permitted the advertising of noncommercial, onsite activities, which the *Metromedia* plurality concluded were not permitted by the San Diego ordinance. *Id.* Importantly, the Sixth Circuit approved the state's determination that "the right to advertise an activity conducted on-site is inherent in the ownership or lease of property." *Id.* at 591. Applying this rationale, it would appear that the right to convey purely ideological speech is also a right inherent in the ownership of property

4. *Rappa v. New Castle County*

Barber cites *Rappa*, in which a candidate for the United States House of Representatives challenged a state statute that permitted authorities to peremptorily remove his campaign signs. *Rappa*, 18 F.3d at 1047. The same statute contained exemptions for a variety of signs, including those advertising the sale or lease of property and onsite activities. The United States Court of Appeals for the Third Circuit relied heavily on Justice Brennan's concurrence in *Metromedia* in devising the following test: Content exempted from restriction had to be significantly related to the particular area in which the sign was viewed. In addition, the state had to show that an exemption to the regulation of speech was substantially related to advancing an important state interest that was at least as important as the interests advanced by the underlying regulation, that the exemption was no broader than necessary to advance the special goal, and that the exemption was narrowly drawn so as to impinge as little as possible on the overall goal. *Id.* Because the court concluded that an exemption permitting offsite signs

advertising local cities, industries, and meetings was not related to the land on which the signs were placed, nor to the function of the highway, the exemption constituted "impermissible content discrimination" and rendered the statute unconstitutional. *Id.* at 1068.

5. The United States Supreme Court's *Ladue* Opinion

A case cited by both parties, which we find particularly persuasive, is *City of Ladue v. Gilleo*, 512 U.S. 43 (1994). Justice Stevens delivered the unanimous opinion of the Court in which a city ordinance prohibiting homeowners from displaying signs on their property was declared an abridgement of First Amendment rights. *Id.* at 58-59.

The ordinance allowed commercial businesses, churches, and nonprofit organizations to display signs that were prohibited at residences.[7] *Id.* at 45. Gilleo sued the city when she was denied a variance to display a twenty-four by thirty-six inch sign reading "Say No to War in the Persian Gulf, Call Congress Now." *Id.* at 45-46. The district court held the city ordinance unconstitutional. Relying on the plurality opinion in *Metromedia*, the United States Court of Appeals for the Eighth Circuit affirmed. The Eighth Circuit found the ordinance a content-based regulation that treated commercial speech more favorably than noncommercial speech and treated some noncommercial speech more favorably than other noncommercial speech. *Id.* at 47. The city argued that the court of appeals erred by demanding that exemptions from the ordinance be supported by compelling state interests. *Id.* at 52. The Supreme Court assumed *arguendo* that the exemptions were content-neutral and turned instead to the question of "whether Ladue may properly *prohibit* Gilleo from displaying her sign." *Id.* at 53.

The Court made the following observations about the city's ordinance. The purpose of the ordinance was to reduce visual clutter that threatened esthetics, property values, privacy, and safety. *Id.* at 47. The Court observed that this was a "valid" purpose. *Id.* at 54. However, the ordinance totally foreclosed a "venerable," "unique," "important and distinct" means of

communication-residential signs-concerning political, religious, or personal messages. *Id.* at 54-55. Significantly, the Court held that even content-neutral prohibitions on speech could violate the First Amendment simply by suppressing too much speech. *Id.* at 55 & n.13. The Court was not convinced that there were adequate substitutes for the means of communication completely banned by the city. *Id.* at 56.

By virtue of their location, residential signs automatically identified the speaker--an important component of attempts to persuade. *Id.* Additionally, since they were cheap and convenient, they were perhaps the best means of reaching the intended audience-the speaker's neighbors. *Id.* at 57. These same attributes were not true for any of the city's suggested alternative means of communication: hand-held signs, letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings. *Id.* at 56. Thus, the Supreme Court affirmed the court of appeals judgment declaring the ordinance unconstitutional. *Id.* at 59.

E. The Texas HBA as Applied to Barber

The parties have not cited a case, nor have we found one, that is directly on point--a challenge to the Highway Beautification Act by a private-property owner foreclosed from engaging in purely ideological speech on his own property. Many of the cases cited present challenges by those who desired to speak on public or private property that they did not own. *John Donnelly & Sons*, 639 F.2d at 6; *Ex parte Tucci*, 859 S.W.2d at 1. Further, very few of the cases deal with the type of speech at issue here-purely ideological speech. *But see City of Ladue*, 512 U.S. at 43.

In recognition of property owners' right to the use and enjoyment of their property, the legislature has drafted several narrow exemptions to the Act.

However, there is no exemption that allows a private-property owner to engage in purely ideological speech on his own property. *Cf. John Donnelly & Sons*, 639 F.2d at 15. The Act prohibits purely ideological speech in locations where it

allows other types of speech, such as speech advertising onsite activities. *Cf. Metromedia*, 453 U.S. at 513 (White, J., plurality op.). The Act would permit Barber to engage in commercial speech and some types of noncommercial speech on his property, but prohibits purely ideological speech. In effect, the Act bans purely ideological speech by Barber on his private property. This is ironic in that ideological speech enjoys the greatest protection under the United States Constitution. *See Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) ("The First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'") (citation omitted). Enforcement of the Texas HBA against Barber has inverted the hierarchy of First Amendment protection. *See Metromedia*, 453 U.S. at 513 (White, J., plurality op.). We hold that the Act in this regard is constitutionally infirm.

Furthermore, Barber has no adequate alternative means of communicating his message. The sign on his property identifies Barber as the speaker. Erecting a sign on property he owns is comparatively cheap and convenient. It is probably the best means, and perhaps the only means, of reaching his intended audience-drivers on Interstate 20. The Act would only permit a comparable billboard in a commercial or industrial area, far from Barber's property. Other possible alternatives-hand-held signs, letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings-would be more expensive, less convenient, and poorly suited to reaching his intended audience, which is, by its nature, constantly changing. *See City of Ladue*, 512 U.S. at 56-57.

Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a hand-held sign may

make the difference between participating and not participating in some public debate. *Id.* at 57 (citations omitted).

We are unpersuaded by the argument that the Act is constitutional because it treats commercial and noncommercial speech the same, for example by permitting the advertisement of all onsite activities, commercial and noncommercial. *See Wheeler*, 822 F.2d at 593. The truth is that there is no commercial equivalent of Barber's purely ideological speech. *See City of Ladue*, 512 U.S. at 57 n.15 ("unlike businesses (and even political organizations) individuals generally realize few tangible benefits from such communication [of their views]"). Therefore, without an exemption permitting ideological speech, commercial and noncommercial speech are not treated equally.

Finally, it was suggested at oral argument that any constitutional flaws in the Act could be remedied by eliminating all exemptions and implementing a total ban of outdoor advertising. On this point, it is well worth quoting the United States Supreme Court.

[T]he City might theoretically remove the defects in its ordinance by simply repealing all of the exemptions. If, however, the ordinance is also vulnerable because it prohibits too much speech, that solution would not save it. Moreover, if the prohibitions in Ladue's ordinance are impermissible, resting our decision on its exemptions would afford scant relief for respondent Gilleo. She is primarily concerned not with the scope of the exemptions available in other locations, such as commercial areas and on church property; she asserts a constitutional right to display an antiwar sign at her own home. *Id.* at 53. The same may be said of the Texas Highway Beautification Act.

CONCLUSION

We reverse the trial court's grant of summary judgment permanently enjoining Pat Barber from displaying and maintaining his outdoor advertising sign. We hold that the Texas Highway Beautification Act is unconstitutional as enforced against Barber in his expression of noncommercial, ideological speech on his own property and order that the Texas

Department of Transportation, its officials, and the Texas Attorney General are hereby enjoined from enforcing the Act as to the previously erected sign. We reverse the trial court's judgment ordering Barber to pay court costs and attorneys' fees. We remand this cause to the trial court for a determination of fees and costs to which Barber may be entitled for having prevailed on this appeal.

Mack Kidd, Justice
Before Justices Kidd, Yeakel and Powers*
Reversed and Rendered in Part; Reversed and Remanded in Part

Filed: April 5, 2001 Publish

* Before John E. Powers, Senior Justice (retired), Third Court of Appeals, sitting by assignment. *See* Tex. Gov't Code Ann. § 74.003(b) (West 1998).

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1. "Outdoor advertising" means an outdoor sign, display, light, device, figure, painting, drawing, message, plaque, poster, billboard, or other thing designed, intended, or used to advertise or inform if any part of the advertising or information content is visible from the main-traveled way of the interstate or primary system. The term does not include a sign or marker giving information about the location of an underground electric transmission line, telegraph or telephone property or facility, pipeline, public sewer, or waterline. Tex. Transp. Code Ann. § 391.001(10) (West 1999).

2. Licenses and permits are not required for signs advertising the sale or lease of the property or activities conducted on the property. Tex. Transp. Code Ann. §§ 391.061(c), .031(b)(2), (3) (West 1999).

3. The parties dispute whether the free speech provision of the Texas Constitution is more protective of Barber's rights than the federal constitution. Because we hold that the Act violates the federal guarantee of free speech, we need not resolve this question. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The Fourteenth Amendment makes this limitation applicable to the states. *City of Ladue v. Gilleo*, 512 U.S. 43, 45 n.1 (1994).

4. *See, e.g., United States v. 29.28 Acres of Land*, 162 F. Supp. 502, 513 (D.N.J. 1958) (holding that government's sight easement across private property for nearby missile site required compensation); *United States v. 102.93 Acres of Land*, 154 F. Supp. 258, 262 (E.D.N.Y. 1957), *aff'd sub nom. United States v. Fox*, 257 F.2d 805 (2d Cir. 1958) (holding that sight easement taken for military purposes required compensation of $750-$1125 per acre).

5. The federal HBA states that "[j]ust compensation shall be paid upon removal of any outdoor advertising sign . . . for . . . [t]he taking from the owner of the real property on which the sign . . . is located, of *the right to erect* and maintain such signs." 23 U.S.C.A. § 131(g)(B) (1990) (emphasis added). The Texas HBA provides that if the commission acquires, by eminent domain, advertising that is "lawfully in existence," the owner shall receive just compensation for "*the right to erect* and maintain the outdoor advertising." Tex. Transp. Code Ann. § 391.033(a), (b)(2) (West 1999) (emphasis added). However, the statutes provide for compensation only when presently existing signs are removed or acquired by eminent domain and not compensation for the property owner's loss of the right to erect new signs. *See* 23 U.S.C.A. § 131(g); Tex. Transp. Code Ann. § 391.033(a), (b).

6. Onsite signs were defined as those "designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 494 (1981). The specified exemptions were as follows:

> government signs; signs located at public bus stops; signs manufactured, transported, or stored within the city, if not used for advertising purposes; commemorative historical plaques; religious symbols; signs within shopping malls; for sale and for lease signs; signs on public and commercial vehicles; signs depicting time, temperature, and news; approved temporary, off-premises, subdivision directional signs; and "[temporary] political campaign signs."

Id. at 494-95.

7. Homeowners could display only residence identification signs, for sale signs, and signs warning of safety hazards. *City of Ladue*, 512 U.S. at 45. The ordinance permitted signs for churches, religious institutions, and schools; identification signs for other not-for-profit organizations; and commercial signs in commercially-zoned or industrially-zoned districts. *Id.* at 47 n.6.

8. Under the Act, Barber could have erected a sign "solely for and relating to a public election." Tex. Transp. Code Ann. § 391.005 (West 1999). Election signs can be erected no more than ninety days prior to an election and must be removed within ten days after an election. *Id.* § 391.005(2). Barber could have erected a sign for the sale or lease of the property on which the sign was located. *Id.* § 391.031(b)(2). He could have erected a sign advertising activities conducted on the property on which the sign was located. *Id.* § 391.031(b)(3). These activities could

be commercial (operation of a gas station or law practice) or noncommercial (political party headquarters or Rotary Club meetings), or used to advertise or inform if any part of the advertising or information content is visible from the main-traveled way of the interstate or primary system. The term does not include a sign or marker giving information about the location of an underground electric transmission line, telegraph or telephone property or facility, pipeline, public sewer, or waterline. Tex. Transp. Code Ann. § 391.001(10) (West 1999).

APPENDIX C

NO. 98-09717

PAT BARBER,	§	IN THE DISTRICT
PLAINTIFF	§	COURT
vs.	§	
	§	OF TRAVIS COUNTY,
TEXAS DEPT. OF	§	TEXAS
TRANSPORTATION;	§	
ET AL.,	§	201ST JUDICIAL
DEFENDANTS	§	DISTRICT

SUMMARY JUDGMENT ON DEFENDANTS COUNTERCLAIM

On March 3, 2000, the court heard the motion for summary judgment filed in this cause by Defendant, TEXAS DEPARTMENT OF TRANSPORTATION, against Plaintiff, PAT BARBER. The Court, after examining the pleadings timely filed, the Defendant's motion for summary judgment and the responses and replies filed by each party, and the summary judgment evidence admitted for consideration, made the following findings:

That the Defendant's counter-claim is a cause of action for a permanent injunction prohibiting Plaintiff from maintaining and requiring the removal of an illegal sign located in Mitchell County, Texas, along the north side of Interstate Highway 20 near mile point 980+94, on a tract of land abutting Interstate highway 20, a controlled-access freeway in the interstate highway system in violation of Texas Transportation Code Sec. 391.001 et. seq.(Vernon Pamph. 1999).

The Court further finds that Defendant is entitled ot recover all court costs. Costs of suit, and reasonable expenses, including administrative costs, in securing removal of the subject sign,

and reasonable attorney's fees of $1,200.00 (One thousand Two Hundred and No/100 Dollars) pursuant to section 391.034 (c) of the Texas Transportation Code.

It is further ORDERED, ADJUDGED and DECREED that Plaintiff Pat Barber is permanently restrained and enjoined from displaying and maintaining the illegal outdoor advertising sign located in Mitchell County, Texas, along the north side of Interstate Highway 20 near mile point 980+94, on a tract of land abutting Interstate highway 20;

It is further ORDERED, ADJUDGED AND DECREED that the Clerk of this Court shall issue a writ of injunction in conformity iwth the terms of this Order and that the same be served up on Plaintiff Pat Barber;

It is further ORDERED, ADJUDGED and DECREED that no bond shall be required of Defendant, State of Texas, for the issuance of permanent injunction;

It is further ORDERED, ADJUDGED, and DECREED that Defendant do have and recover court costs, other costs incurred in this suit expended, and reasonable attorneys' fees of $1,200.00 (One Thousand Two Hundred and No/100 Dollars) against Plaintiff, Pat Barber;

It is further ORDERED, ADJUDGED, and DECREED that all writs and processes for the enforcement and collection of this Judgment or the costs of Court may issue as necessary.

All other relief not expressly granted herein is denied.

SIGNED THIS 5TH DAY OF MAY, 2000.

MARY PEARL WILLIAMS
JUDGE PRESIDING

APPENDIX D

NO. 98-09717

PAT BARBER,	§	IN THE DISTRICT
PLAINTIFF	§	COURT
vs.	§	
	§	OF TRAVIS COUNTY,
TEXAS DEPT. OF	§	TEXAS
TRANSPORTATION;	§	
ET AL.,	§	201ST JUDICIAL
DEFENDANTS	§	DISTRICT

PARTIAL SUMMARY JUDGMENT

On October 25, 1999, the Court heard the motion for summary judgment filed in this cause by plaintiff PAT BARBER and the counter-motion for summary judgment filed by defendants, TEXAS DEPARTMENT OF TRANSPORTATION; CHAS W. HEALD, P.E., EXEC. DIRECTOR OF TEXAS DEPT. OF TRANSPORTATION, in his official capacity; a. JAMES HENRY III, INTERIM DIRECTOR, RIGHT-OF-WAY DIVISION, TEXAS DEPT. OF TRANSPORTATION, in his official capacity; MARIBEL P. CHAVES, P.E., ABILINE DISTRICT ENGINEER, TEXAS DEPARTMENT OF TRANSPORTATION, in her official capacity; and the TEXAS ATTORNEY GENERAL. The court, after examining the pleadings timely filed, the plaintiff's motion for summary judgment, defendants' counter-motion for summary judgment, the responses and replies filed by each party, and the summary judgment evidence admitted for consideration, determined that plaintiff's motion for summary judgment should be denied and that defendants are entitled to partial summary judgment:

IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment is DENIED and that plaintiff take nothing

against defendants; that all claims asserted by plaintiff are denied, and that all costs of court be taxed against plaintiff.

IT IS FURTHER DECREED that, as a matter of law, the provisions of the Texas Highway Beautification Act, chapter 391 of th Texas Transportation Code (Vernon Pamph. 1999), as applied to plaintiff are constitutional under both the United States and Texas Constitutions.

IT IS FURTHER DECREED that defendant TEXAS DEPARTMENT OF TRANSPORTATION, its agents, servants and employees, including all named defendants, did not at any time discriminatorily enforce the provisions of the Texas Highway Beautification Act, chapter 391 of the Texas Transportation Code (Vernon Pamph. 1999), against plaintiff.

IT IS FURTHER ORDERED that this matter be set in accordance with the rules of this Court for trial on the issue of defendant Texas Department of Transportation's counterclaim for the removal of plaintiff's outdoor advertising sign, including defendant Texas Department of Transportation's claims for reasonable attorney's fees and administrative expenses.

SIGNED THIS 23RD DAY OF NOVEMBER, 1999.

DESMOND JOHNSON
JUDGE PRESIDING

APPENDIX E

Texas Transportation Code, Chapter 391
SUBTITLE H. HIGHWAY BEAUTIFICATION
CHAPTER 391. HIGHWAY BEAUTIFICATION ON INTERSTATE AND PRIMARY SYSTEMS AND CERTAIN ROADS
SUBCHAPTER A. GENERAL PROVISIONS

§ 391.001. Definitions
In this chapter:

....

(2) "Eligible highway" means a highway that:
(A) is located outside an urbanized area with a population of 50,000 or more; and
(B) qualifies for a maximum speed limit of 65 miles per hour under 23 U.S.C. Section 154 or, if that law is repealed, qualified for a maximum speed limit of 65 miles per hour on the day before the effective date of the repeal.

....

(4) "Information logo sign" means a specific information logo sign or a major shopping area guide sign.

(5) "Interstate system" means that portion of the national system of interstate and defense highways that is located in this state and is designated officially by the commission and approved under Title 23, United States Code

.....

10) "Outdoor advertising" means an outdoor sign, display, light, device, figure, painting, drawing, message, plaque, poster, billboard, or other thing designed, intended, or used to advertise or inform if any part of the advertising or information content is visible from the main-traveled way of the interstate or primary system. The term does not include a sign or marker giving information about the location of an underground electric transmission line, telegraph or telephone property or facility, pipeline, public sewer, or waterline.

....

(12) "Specific information logo sign" means a rectangular sign panel imprinted with the words "GAS," "FOOD," "LODGING," or "CAMPING," or with a combination of those words, and the specific brand names of commercial establishments offering those services.

....

§ 391.002. Purpose

(a) Subject to the availability of state and federal funds, it is the intent of the legislature to comply with the Highway Beautification Act of 1965 (23 U.S.C. Sections 131, 136, 319) to the extent that it is implemented by the United States Congress. This chapter is conditioned on that law.

(b) The legislature declares that it is necessary to regulate the erection and maintenance of outdoor advertising and the establishment, operation, and maintenance of junkyards in areas adjacent to the interstate and primary systems to:

(1) promote the health, safety, welfare, morals, convenience, and enjoyment of the traveling public; and

(2) protect the public investment in the interstate and primary systems.

(c) The legislature considers that the following are means of protecting and providing for the general welfare of the traveling public and promoting the safety of citizens using the highways of this state:

(1) landscaping and developing recreational areas;

(2) acquiring interests in and improving strips of real property within, adjacent to, or within view of the interstate or primary system that are necessary for the restoration, preservation, and enhancement of scenic beauty; and

(3) developing publicly owned and controlled rest and sanitary facilities in or adjacent to highway rights-of-way.

§ 391.003. Violation of Rule; Offense

(a) A person commits an offense if the person wilfully violates a rule adopted by the commission under this chapter.

(b) An offense under this section is a misdemeanor punishable

by a fine of not less than $500 or more than $1,000.
(c) Each day of a rule violation is a separate offense.

§ 391.004 Highway Beautification Fund Account [omitted]

§ 391.005. Exemption

Text of section effective following Transportation Commission determination

This chapter does not apply to a sign erected solely for and relating to a public election if the sign:
(1) is on private property;
(2) is erected not earlier than the 90th day before the date of the election and is removed not later than the 10th day after the election date;
(3) is constructed of lightweight material; and
(4) has a surface area not larger than 50 square feet.

SUBCHAPTER B. REGULATION OF OUTDOOR ADVERTISING GENERALLY

§ 391.031. Unlawful Outdoor Advertising; Offense

(a) A person commits an offense if the person wilfully erects or maintains outdoor advertising:
(1) within 660 feet of the nearest edge of a right-of-way if the advertising is visible from the main-traveled way of the interstate or primary system; or
(2) outside an urban area if the advertising is located more than 660 feet from the nearest edge of a right-of-way, is visible from the main-traveled way of the interstate or primary system, and is erected for the purpose of having its message seen from the main-traveled way of the interstate or primary system.
(b) A person does not commit an offense if the person erects or maintains in an area described by Subsection (a):
(1) directional or other official outdoor advertising authorized by law, including advertising pertaining to a natural wonder or a scenic or historic attraction;
(2) outdoor advertising for the sale or lease of the property on

which it is located;
(3) outdoor advertising solely for activities conducted on the property on which it is located;
(4) outdoor advertising located within 660 feet of the nearest edge of a right-of-way in an area in which the land use:
(A) is designated industrial or commercial under authority of law; or
(B) is not designated industrial or commercial under authority of law but the land use is consistent with an area designated industrial or commercial;
(5) outdoor advertising that has as its purpose the protection of life and property; or
(6) outdoor advertising erected on or before October 22, 1965, that the commission, with the approval of the secretary of the United States Department of Transportation, determines to be a landmark of such historic or artistic significance that preservation is consistent with the purposes of this subchapter.
(c) The determination of whether an area is to be designated industrial or commercial must be made under criteria established by commission rule and according to actual land use.
(d) An offense under this section is a misdemeanor punishable by a fine of not less than $500 or more than $1,000. Each day of the proscribed conduct is a separate offense.

§ 391.032. Regulation of Outdoor Advertising in Industrial or Commercial Area

(a) The commission by rule may regulate the orderly and effective display of outdoor advertising consistent with the customary use of outdoor advertising in this state in an area in which the land use:
(1) is designated industrial or commercial under authority of law; and
(2) is not so designated but in which the land use is consistent with areas designated industrial or commercial in the manner provided by Section 391.031(c).
(b) The commission may agree with the secretary of the United

States Department of Transportation to regulate the orderly and effective display of outdoor advertising in an area described by Subsection (a).

§ 391.033 Acquisition of Outdoor Advertising by Commission [omitted]

§ 391.034. Removal of Nuisance Outdoor Advertising by Commission

(a) Outdoor advertising that is erected or maintained in violation of this chapter:

(1) endangers the health, safety, welfare, morals, convenience, and enjoyment of the traveling public and the protection of the public investment in the interstate and primary highway systems; and

(2) is a public nuisance.

(b) On written notice by certified mail from the department, an owner of outdoor advertising that is a public nuisance under Subsection (a) shall remove the advertising. If the owner does not remove the outdoor advertising within 45 days of the date of the notice, the department may direct the attorney general to apply for an injunction to:

(1) prohibit the owner from maintaining the advertising; and

(2) require the removal of the advertising.

(c) The state is entitled to recover from the owner of outdoor advertising removed under an action brought under Subsection (b) all administrative and legal costs and expenses incurred to remove the advertising, including court costs and reasonable attorney's fees.

§ 391.035. Civil Penalty

(a) In addition to being subject to a criminal penalty or injunctive action, a person who intentionally violates this subchapter or Subchapter C is liable to the state for a civil penalty. The attorney general may sue to collect the penalty.

(b) The amount of the civil penalty is not less than $500 or more than $1,000 for each violation, depending on the

seriousness of the violation. A separate penalty may be collected for each day a continuing violation occurs.
(c) A penalty collected under this section shall be deposited to the credit of the state highway fund.

§ 391.036 Scope of Commission Responsibility [omitted]

§ 391.037. Outdoor Advertising by Agricultural Fairs
Outdoor advertising that is an outdoor sign may include the logo or emblem of an entity if:
(1) the sign is erected or maintained by:
(A) a nonprofit county agricultural fair;
(B) a public or private elementary or secondary school; or
(C) a public or private institution of higher education;
(2) the sign is erected or maintained in a county with a population of 65,000 or less;
(3) the entity sponsors or provides significant funding to the agricultural fair, school, or institution of higher education; and
(4) the entity's logo or emblem occupies less than 25 percent of the area of the sign.

SUBCHAPTER C. LICENSE AND PERMIT FOR OUTDOOR ADVERTISING

§ 391.061. Outdoor Advertising Without License; Offense
(a) A person commits an offense if the person wilfully erects or maintains outdoor advertising in an area described by Section 391.031(a) without a license under this subchapter.
(b) An offense under this section is a misdemeanor punishable by a fine of not less than $500 or more than $1,000. Each day of the proscribed conduct is a separate offense.
(c) A person is not required to obtain a license to erect or maintain outdoor advertising described by Section 391.031(b)(2) or (3).

§ 391.062. Issuance and Period of License [omitted]

§ 391.063. License Fee [omitted]

§ 391.064. Surety Bond [omitted]

§ 391.065. Rules; Forms [omitted]

§ 391.066. Revocation or Suspension of License; Appeal [omitted]

§ 391.067. Outdoor Advertising Without Permit; Offense
(a) A person who has a license issued under this subchapter commits an offense if the person wilfully erects or maintains outdoor advertising for which a license is required under Section 391.061 unless that person also has a permit for outdoor advertising.
(b) An offense under this section is a misdemeanor punishable by a fine of not less than $500 or more than $1,000. Each day of the proscribed conduct is a separate offense.
....

§ 391.068. Issuance of Permit [omitted]

§ 391.069. Fee Amounts [omitted]

§ 391.070. Exceptions for Nonprofit Organizations [omitted]

SUBCHAPTER D. SPECIFIC INFORMATION LOGO SIGNS

§ 391.091. Erection and Maintenance of Signs [omitted]

§ 391.092. Regulation of Signs Generally
(a) The commission shall:
(1) regulate the content, composition, placement, erection, and maintenance of specific information logo signs and supports on an eligible highway right-of-way; and
(2) adopt rules necessary to administer and enforce this subchapter.

(b) A specific information logo sign must:
(1) have a blue background with a white reflective border; and
(2) contain a principal legend equal in height to the directional legend.
(c) A specific information logo sign may not:
(1) contain a message, symbol, or trademark that resembles an official traffic-control device; or
(2) contain more than six establishment names for each sign panel.

§ 391.093. Eligibility for Display on Sign
(a) A commercial establishment, to be eligible to have its name displayed on a specific information logo sign, must provide gas, food, lodging, or camping and be located not more than three miles from an interchange on an eligible highway. If no service participating or willing to participate in the specific information logo sign program is located within three miles of an interchange, the commission may grant permits for commercial establishments located not farther than:
(1) six miles from the interchange;
(2) nine miles from the interchange if no service participating or willing to participate in the program is located within six miles from the interchange;
(3) 12 miles from the interchange if no service participating or willing to participate in the program is located within nine miles of the interchange; or
(4) 15 miles from the interchange if no service participating or willing to participate in the program is located within 12 miles of the interchange.
(b) An establishment that provides gas must ....
(c) An establishment that provides food must ....
(d) An establishment that provides lodging must ....
(e) An establishment that provides camping must ....
(f) The department shall by rule provide that an establishment that provides lodging is eligible to have its name displayed on a specific information logo sign if the establishment is:

(1) visible from an eligible highway or an interchange on an eligible highway; and
(2) located on a street that is not more than two turns off the access or frontage road to the eligible highway.
....

§ 391.0935. Major Shopping Area Guide Signs
(a) Unless the commission determines there is a conflict with federal law, the commission shall establish a program that allows the erection and maintenance of major shopping area guide signs at appropriate locations along eligible urban highways.
(b) The commission shall adopt rules regulating the content, composition, placement, erection, and maintenance of major shopping area guide signs and supports within eligible urban highway rights-of-way. A major shopping area is entitled to have its name displayed on major shopping area guide signs if it is located not farther than three miles from an interchange on an eligible urban highway.
(c) A major shopping area that has its name displayed on a major shopping area guide sign shall reimburse the commission for all costs associated with the composition, placement, erection, and maintenance of the sign.
(d) Major shopping area guide signs may be included as part of exit direction signs, advance guide signs, and supplemental guide signs and must include guide signs for both directions of traffic on an eligible urban highway.
(e) Sections 391.093(b)-(e) do not apply to major shopping area guide signs.

§ 391.094. Duty Not to Discriminate
A commercial establishment identified on a specific information logo sign shall conform to all applicable laws concerning the provision of public accommodations without regard to race, religion, color, sex, or national origin.

§ 391.095. Placement of Signs

(a) The contractor installing a specific information logo sign shall place the sign so that:
(1) the sign is at least 800 feet from the previous interchange and at least 800 feet from the exit direction sign at the interchange from which the services are available;(2) two signs having the same legend are at least 800 feet apart, but are not excessively spaced; and
(3) a motorist, after following the sign, can conveniently reenter the highway and continue in the original direction of travel.(b) A specific information logo sign that is placed along a ramp or at a ramp terminal must be a duplicate of the corresponding establishment logo sign, except that the ramp sign must:
(1) be smaller;
(2) include the distance to the commercial establishment; and
(3) include directional arrows instead of directions shown in words.
(c) If the service facilities are not visible from an interchange ramp terminal, additional signs may be placed along the ramp or at the ramp terminal.

§ 391.096. Disposition of Funds [omitted]

§ 391.097. Major Agricultural Interest Sign
(a) In this section:
(1) "Eligible rural highway" means a highway that:
(A) has noncontrolled access; and
(B) is outside the corporate limits of a municipality.
(2) "Major agricultural interest" means a farm, ranch, winery, nursery, greenhouse, or other facility that:
(A) sows or cultivates an agricultural product;
(B) devotes a minimum of five acres of land to the production of the agricultural product;
(C) markets the product on the premises as a retail sale of the product; and
(D) conducts public tours of the grounds or facilities.
(b) The commission shall enter into one or more contracts with an individual, firm, group, or association in this state to erect

and maintain major agricultural interest signs at appropriate locations along eligible rural highways.

(f) The commission shall:

(1) regulate the content, composition, placement, erection, and maintenance of major agricultural interest signs and supports on an eligible rural highway right-of-way; and

(2) adopt rules necessary to administer and enforce this section.

§ 391.098. Variances

(a) The commission shall authorize the director to grant variances, on a case-by-case basis, to the eligibility, location, or placement of specific logo signs, major agricultural interest signs, and major shopping area guide signs, including the highways along which a sign may be located. The commission may adopt rules prescribing conditions or guidelines the director should or must consider when determining whether to grant a variance.

(b) The director may grant a variance if the director determines that:

(1) the variance would promote traffic safety;

(2) the variance would improve traffic flow;

(3) an overpass, highway sign, or other highway structure unduly obstructs the visibility of an existing commercial sign; or

(4) the variance would satisfy other conditions or guidelines prescribed by commission rules authorizing the granting of variances.

(c) The director may not grant a variance to the requirements of this subchapter regarding supports, content, or composition of signs.

No. 03-510

In the Supreme Court of the United States

PAT BARBER,
Petitioner,

v.

TEXAS DEPARTMENT OF TRANSPORTATION, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Texas

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Texas Supreme Court majority erred in concluding that the Texas Highway Beautification Act can be applied, consistent with the First Amendment, to prohibit Petitioner from engaging in political speech on a billboard on his own property.

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STATEMENT OF THE CASE

This case concerns an as applied, First-Amendment-based challenge to the Texas Highway Beautification Act (THBA) arising from the placement of a sign on the Petitioner's non-residential, rural property. The case is splitless, and Petitioner asks merely for error correction. The decision of the Texas Supreme Court is correct, and there are significant vehicle problems with the case because Petitioner has voluntarily removed the sign in question, leaving nothing to sustain a controversy.

I. THE SIGN.

The genesis of this suit is a billboard bearing the statement, "Just say NO to searches," installed in 1997 by Pat Barber, an attorney, on a strip of non-residential property adjacent to Interstate 20 in Mitchell County, Texas. *See* Pet. App., at 4a. Barber failed to apply for a license to display the sign, which was within 660 feet of the right-of-way in a rural area and which admittedly did not qualify for any of the THBA's exemptions. *See id.*, at 45a. The Texas Department of Transportation (TxDOT), which is charged by law with enforcing the THBA, TEX. TRANSP. CODE §391.034(b), sent Barber written notice that the sign violated the THBA and requested its removal. *See id.*, at 5a.

In response, Barber filed this lawsuit, seeking injunctive relief and a declaratory judgment that the THBA is unconstitutional. *Id.*, at 6a. The State filed a counterclaim seeking to enforce the THBA. *Id.* The trial court granted the State summary judgment, held that the THBA is constitutional under the Texas and United States Constitutions on its face and as applied to Barber, enjoined Barber from displaying the sign, and awarded the State attorneys' fees and costs. *See id.*, at 45a. Prior to judgment, Barber voluntarily removed his sign. *See* App. 2a-3a, 7a. On appeal, Barber argued that the THBA as applied to his sign was unconstitutional. The state court of appeals reversed and held that the THBA as applied to Barber violated the First Amendment of the United States Constitution. *Barber v. Tex. Dep't of Transp.*, 49 S.W.3d 12, 25

(Tex. App.—Austin 2001), *rev'd*, 111 S.W.3d 86 (Tex. 2003). Two years later, the Supreme Court of Texas reversed and rendered judgment for the State. *See* Pet. App., at 1a-2a.

II. THE TEXAS HIGHWAY BEAUTIFICATION ACT.

Like similar statutes across the nation, the THBA was passed in response to the Federal Highway Beautification Act, which requires States to "effective[ly] control" outdoor advertising in areas adjacent to interstate and federally funded state highways or forego ten percent of their federal highway funds. 23 U.S.C. §131(b). The federal act seeks to curb the proliferation of billboards along the nation's highways and to "protect the public investment in . . . highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C. §131(a).

The express purpose of the THBA is to comply with the federal law: "[I]t is the intent of the legislature to comply with the Highway Beautification Act of 1965 (23 U.S.C. §§131, 136, 319) to the extent that it is implemented by the United States Congress. This chapter is conditioned on that law." TEX. TRANSP. CODE §391.002(a). Consistent with the federal law, the purpose of the THBA is to "promote the health, safety, welfare, morals, convenience, and enjoyment of the traveling public," and to "protect the public investment in the interstate and primary systems." *Id.* §391.002(b)(1), (2).

To accomplish these objectives, the THBA prohibits "outdoor advertising" in a limited protected area along interstates and federally funded state highways: either (1) within 660 feet of a right-of-way if the advertisement is visible from the interstate or primary highway system,[1] or (2) if outside an urban area, more than

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1. The definition limits the THBA's coverage to federally funded highways in Texas. *See* TEX. TRANSP. CODE §391.001(5); 23 U.S.C.

660 feet from the right-of-way, but visible from the highway and erected for the purpose of having its message seen from the highway. *Id.* §391.031(a)(1), (2). "Outdoor advertising," is defined as:

> an outdoor sign, display, light, device, figure, painting, drawing, message, plaque, poster, billboard, or other thing designed, intended, or used to *advertise or inform* if any part of the advertising or information content is visible from the main-traveled way of the interstate or primary system.

Id. §391.001(10) (emphasis added). By including the terms "advertise or inform," the definition applies to both commercial and noncommercial signs. The THBA restricts advertising only along this federal corridor. It does not apply to any other locations in the State.

In compliance with federal directive, the THBA exempts from regulation:

> (1) directional or other official outdoor advertising authorized by law, including advertising pertaining to a natural wonder or a scenic or historic attraction;
>
> (2) outdoor advertising for the sale or lease of the property on which it is located;
>
> (3) outdoor advertising solely for activities conducted on the property on which it is located;
>
> (4) outdoor advertising located within 660 feet of the nearest edge of a right-of-way in an area in which the land use:

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§131(t).

(A) is designated industrial or commercial under authority of law; or

(B) is not designated industrial or commercial under authority of law but the land use is consistent with an area designated industrial or commercial;

(5) outdoor advertising that has as its purpose the protection of life and property; or

(6) outdoor advertising erected on or before October 22, 1965, that the commission, with the approval of the secretary of the United States Department of Transportation, determines to be a landmark of such historic or artistic significance that preservation is consistent with the purposes of this subchapter.

§391.031(b); *see also* 23 U.S.C. §131(b), (c), (d) (federal directive).

In addition, the THBA exempts signs solely for and relating to a public election if the sign:

(1) is on private property;

(2) is erected not earlier than the 90th day before the date of the election and is removed not later than the 10th day after the election date;

(3) is constructed of lightweight material; and

(4) has a surface area not larger than 50 square feet.

Id. §391.005.

SUMMARY OF THE ARGUMENT

The Court should decline to grant a writ of certiorari for three reasons. First, no conflict exists between the Texas Supreme Court's decision and decisions of other state supreme courts or federal courts of appeals on the particular issue in this case. In fact,

the only circuit court decision addressing a similar statute upheld that statute's constitutionality. Absent a conflict among courts, Barber essentially asks the Court to engage in error correction, an exercise that does not justify the Court's certiorari jurisdiction. Second, Barber's suit is moot because he voluntarily removed his sign at the outset of the litigation and because his case does not fit any exception to the mootness doctrine. Finally, the Court should deny the writ because the Supreme Court of Texas properly concluded that the Texas statute comports with the First Amendment.

ARGUMENT

I. THE PETITION FAILS TO DEMONSTRATE A CONFLICT FOR THE COURT TO RESOLVE.

In his petition, Barber fails even to allege a conflict between the decisions of the Texas Supreme Court and federal circuit courts or other state high courts as a basis for granting certiorari. He does not argue that there is a conflict over the constitutionality of state statutes enacted pursuant to the FHBA. He does not contend—much less demonstrate—that another relevant court would have reached a different decision than the decision below when presented with the same facts. Rather, he argues merely that the Supreme Court of Texas "misapplie[d] the law for determining whether a restriction on speech is content-based" and "undervalue[d] Petitioner's right to engage in core political speech on his own property." Pet., at 5. But an allegation of a single misapplication of the law simply does not satisfy the Court's prerequisites for review. *See* S. CT. R. 10. Despite the fact that "this Court is not a forum for the correction of errors," *Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting), that is precisely the task that the petition requests the Court to perform.

Although Barber argues, as a general proposition, that the multiple opinions in *Metromedia v. City of San Diego*, 453 U.S. 490 (1981), have led to disparate decisions among the lower courts, *see* Pet., at 5-6, 19, he merely cites a string of cases with no discussion of their facts or holdings and no explanation of why they allegedly conflict with the Texas Supreme Court's decision in this case. The most Barber can say about this group of cases is that it demonstrates "disparate directions in applying the First Amendment to billboards," *id.*, at 19, a "conflict" of such generality that it does not bear on Barber's question presented. Far from establishing a conflict between the Texas Supreme Court's decision and a decision of a relevant court striking down a substantially similar statute, Barber alleges only that lower courts have generally applied the Court's *Metromedia* decision both narrowly and broadly. *Id.*, at 19. Barber's observation does not even come close to demonstrating that, if presented with the same facts, a federal circuit court or state high court would reach a different conclusion than the one reached by the Supreme Court of Texas. If all that were necessary to show a conflict were one decision upholding and one decision invalidating a restriction of some type on a billboard somewhere, with no similarity of statute and facts, then every billboard case—or every First Amendment case regarding any means of communication—would be appropriate for certiorari.

Not surprisingly, when Barber's cases are examined, it is apparent that they do not support a genuine conflict. Only one of the decisions, *Wheeler v. Commissioner of Highways*, 822 F.2d 586 (CA6 1987), involves a similar statute and circumstance, and that case does not demonstrate any division in the lower courts. Rather, the Sixth Circuit, like the Texas Supreme Court in this case, *upheld* Kentucky's Billboard Statute, which was also enacted pursuant to the Federal Highway Beautification Act and is almost identical to the THBA. Thus, far from being in conflict, *Wheeler* is entirely in agreement with the decision below.

The Court declined certiorari in *Wheeler,* 484 U.S. 1007 (1988), and no conflict has arisen since then that make this issue any more worthy of the Court's review. Indeed, Petitioner has been unable to point to even a single case—state or federal—striking down a state highway beautification act on First Amendment grounds.

Moreover, the cases identified by Barber all concern statutes wholly distinct from the THBA, making them insufficient to support a conflict. The THBA permits signs related to onsite activity (without regard to whether the activity is commercial or non-commercial), offsite signs in industrial or commercial areas, and various other types of offsite signs. *See* Pet. App., at 70a-71a. By its terms, therefore, the THBA does not ban all offsite signs. *See id.* Yet all but one of Barber's cited cases striking down billboard restrictions concern *total* bans on offsite billboards. *See Matthews v. Town of Needham*, 764 F.2d 58, 59-60 (CA1 1985); *Ackerley Communications of Mass., Inc. v. City of Cambridge*, 88 F.3d 33, 34 (CA1 1996); *Nat'l Adver. Co. v. Town of Babylon*, 900 F.2d 551, 554 n.1 (CA2 1990). In contrast, the THBA permits many categories of offsite signs. *See* Pet. App., at 70a-71a. The fact that other courts have held that *total* bans on offsite billboards violate the First Amendment sheds no light on whether those courts would also hold that a more narrow ban is unconstitutional, nor do they suggest that the Texas Supreme Court was incorrect in deciding that the THBA's limited ban is constitutional. Thus, these decisions demonstrate no conflict.

The single case Barber cites that did not concern a total ban on offsite billboards addressed a restriction directed solely at political speech. *See Whitton v. City of Gladstone*, 54 F.3d 1400, 1402 n.2-4 (CA8 1995) (overturning restriction on election signs). *Whitton* did not address the onsite/offsite distinction or the subject-matter exceptions that are at the heart of this case; thus, it likewise does not conflict with the decision below.

Because no genuine conflict exists with regard to the decision below, nor any important and unsettled question of constitutional law, the Court should deny certiorari. *See* S. CT. R. 10. Even if Barber were correct that this case presents an important issue of constitutional law, then it surely would recur again in another context. The fact that Barber can point to no decision, state or federal, invalidating any state highway beautification act—despite the existence for decades of many such state states pursuant to the federal Highway Beautification Act of 1965—powerfully refutes Barber's claim that this case presents an important and recurring issue of constitutional law.

At a minimum, the Court should allow the issue to percolate and wait until a conflict does develop before granting review. To grant review now, as Barber urges—before any federal court of appeals or state supreme court has heard and accepted a First Amendment challenge to a state highway beautification act—would be premature. With the passage of time, three outcomes are possible: first, given the paucity of reported cases challenging these laws over the past four decades, no further decisions could issue; second, additional federal courts of appeals and state supreme courts could consider the issue and agree with the Texas Supreme Court; or third, a conflict could develop, and other courts could write opinions explaining their reasoning for questioning the constitutionality of state highway beautification statutes. In the first two instances, the issue would not merit this Court's consideration, and, in the third, the Court would have the benefit of the analysis of the lower courts before deciding whether to grant review. In short, if the issue does not recur, it is not important, and if it does, then the Court should wait for a conflict before considering the question.

Accordingly, because there is no conflict in the courts of appeals or the state supreme courts, and because a conflict is unlikely to arise, the Court should deny certiorari.

II. BARBER'S CLAIM IS MOOT BECAUSE HE HAS VOLUNTARY REMOVED, AND NEVER RE-ERECTED, THE SIGN THAT IS THE SOURCE OF CONTROVERSY.

Additionally, a significant vehicle problem strongly counsels against granting certiorari: Barber's suit challenging the THBA became moot when he voluntarily removed his sign prior to any order of the district court that he do so. Contrary to subsequent statements he has made, Barber admitted in his trial-court pleadings that he voluntarily removed his sign on November 4, 1999—prior to the court's summary judgment order—because TxDOT had declined to postpone any enforcement action to remove the sign pending appeal. App., at 2a-3a, 7a. Any intention Barber might have to erect the billboard again cannot revive his suit after it has been moot for over four years.[2]

Moreover, and critically, there is no evidence that Barber made any attempt to raise the billboard anew during the *two-year* interval between the state appeals court's decision, which was favorable to Barber, and the Texas Supreme Court's reversal of that decision. During that two-year interval, Barber was entirely free to re-erect the billboard, as the state appeals court had held the THBA unconstitutional as applied to it. But he did not. Because Barber voluntarily removed, and never replaced, the billboard in question, there is no live controversy for the Court to resolve.

For a plaintiff to have standing, an actual controversy must exist at all stages of the litigation, not merely at the time the complaint

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2. The Supreme Court of Texas rejected TxDOT's mootness argument without discussion. *See* Pet. App., at 7a. Although that court properly resolved the merits of the First Amendment issue, it should have determined that Barber's suit was moot, and mootness remains a barrier to this Court's jurisdiction.

is filed. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (internal quotations omitted).

Barber's voluntary acts of removing his sign and then failing to replace it after the state court of appeals's decision rendered the litigation merely hypothetical. *See Arizonans for Official English*, 520 U.S., at 72 (recognizing that voluntary resignation from public sector employment mooted case). Lacking a current controversy, Barber's suit challenging the THBA rests instead on his assumed intention to put up the sign again, an assumption belied by his conduct during the two years after the court of appeals decision. Yet "[a]bstract injury is not enough . . . . The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). Past exposure to allegedly illegal conduct does not in itself show a present case or controversy. *Renne v. Geary*, 501 U.S. 312, 320-21 (1991); *O'Shea*, 414 U.S., at 494.

Barber argued below that his case falls within the "capable of repetition, yet evading review" exception to the mootness doctrine. This exception, however, applies only in rare circumstances. To invoke the exception, a plaintiff must prove that (1) the challenged action was too short in duration to be litigated fully before the action ceased or expired; *and* (2) a reasonable expectation exists that the same complaining party will be subjected to the same action again. *Murphy*, 455 U.S., at 482 (emphasis added). A plaintiff must demonstrate that he meets both elements of the mootness-exception test. *Id.*, at 482 (observing that the "doctrine [is] limited to the situation where two elements are combined.").

Barber's suit cannot satisfy the first prerequisite of this exception because TxDOT's enforcement of the THBA was not too short in duration to be litigated fully before Barber removed his sign. Indeed, TxDOT had not even secured a judgment on its counterclaim to enforce the THBA when Barber removed the sign on his own initiative. App., at 2a-3a, 7a. In fact, in granting summary judgment on TxDOT's counterclaim, the district court had to strike through the portion of the order requiring Barber to remove the sign because he had already removed it. App., at 2a-3a. Rather than litigating his case fully, Barber voluntarily removed the sign and with it his sole basis for bringing suit. Therefore, even if Barber could satisfy the second prong of the mootness exception, he could not satisfy the first requirement, and so the exception cannot apply. *See Murphy*, 455 U.S., at 482. Because this case is moot by virtue of the petitioner's voluntary action of removing the sign, the Court should deny certiorari.

III. THE TEXAS SUPREME COURT'S DECISION WAS CORRECT.

Even if the Court were inclined to grant certiorari for the error-correction purpose to which the petition is on its face limited, this case would not be an appropriate candidate because it was correctly decided by the Supreme Court of Texas. As that court properly determined, the THBA is content-neutral, treating commercial and non-commercial speech equally. *See* Pet. App., at 17a-24a. Thus, as recognized by the court, it is subject to, and satisfies, intermediate scrutiny because it is narrowly tailored to serve the substantial state interests of highway safety and aesthetics. *See id.*, at 25a (citing *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47 (1986)). Moreover, as the Texas Supreme Court concluded, it leaves open adequate alternative channels of communication, because Barber could arrange to erect his sign in an industrial or commercial area along the same highway. *See id.*, at 26a-29a.

The main concern advanced in the petition is that the THBA's exception for signs related to onsite activities, although facially neutral as between commercial and non-commercial speech, will *in practice* result in greater restrictions on non-commercial speech, which, Barber contends, is prohibited by the plurality opinion in *Metromedia*. *See* Pet., at 8-11. Thus, although the onsite-activity exception would allow a veterans organization to display a sign on its property stating, "Support Our Vietnam Veterans," and would allow a church to exclaim, "Praise God," just as it would permit a restaurant to advertise, "Eat at Joe's," Barber argues that this exception impermissibly favors commercial speech. Yet this appeal is not an appropriate vehicle to address Barber's concern, because he introduced no evidence that signs with non-commercial messages are less likely to fall under the onsite-activity exception than signs with commercial messages nor any evidence that the exception has had any discriminatory effect historically, despite the fact that the THBA has been in effect for over thirty years. The Court should decline to accept Barber's invitation to engage in presumptions concerning the alleged disparate impact of the onsite-activity exception when he failed to introduce any evidence supporting his disparate-impact contention.

Because the petition does not identify any weaknesses in the decision below that merit the Court's attention, the Court should deny certiorari.

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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COUNSEL FOR RESPONDENTS

January 2004

CAUSE NO. 98-09717

PAT BARBER,	§	IN THE DISTRICT
	§	COURT
PLAINTIFF	§	
	§	
VS.	§	
	§	
TEXAS DEPT. OF TRANSPORTATION; CHAS. W. HEALD, P.E., EXEC. DIRECTOR OF TEXAS DEPT. OF TRANSPORTATION, in his official capacity; A. JAMES HENRY, III, INTERIM DIRECTOR, RIGHT-OF-WAY DIVISION, TEXAS DEPT. OF TRANSPORTATION, in his official capacity; MARIBEL P. CHAVEZ, P.E. ABILENE DISTRICT ENGINEER, TEXAS DEPT. OF TRANSPORTATION, in her official capacity; BLAIR W. HAYNIE, P.E., DIRECTOR OF TRANSPORTATION, PLANNING AND DEVELOPMENT, TEXAS DEPT. OF TRANSPORTATION, in his official capacity; THE ATTORNEY GENERAL OF TEXAS	§	OF TRAVIS COUNTY, TEXAS
	§	
DEFENDANTS	§	201ST JUDICIAL
	§	DISTRICT

SUMMARY JUDGMENT ON DEFENDANT'S COUNTERCLAIM

On March 3, 2000, the Court heard the motion for summary judgment filed in this cause by Defendant, TEXAS DEPARTMENT OF TRANSPORTATION, against Plaintiff, PAT BARBER. The Court, after examining the pleadings timely filed, the Defendant's motion for summary judgment and the responses and replies filed by each party, and the summary judgment evidence admitted for consideration, made the following findings:

That Defendant's counter-claim is a cause of action for a permanent injunction prohibiting Plaintiff from maintaining and requiring the removal of an illegal sign located in Mitchell County, Texas, along the north side of Interstate Highway 20 near mile point 980+94, on a tract of land abutting Interstate highway 20, a controlled-access freeway in the interstate highway system in violation of Texas Transportation Code Sec. 391.001 et seq. (Vernon Pamph. 1999).

[Filed in the District Court
of Travis County, Texas
MAY -5 2000
at 10:16 A.M.
Amalia Rodriguez-Mendoza]
000601

The Court further finds that Defendant is entitled to recover all court costs, costs of suit, and reasonable expenses, including administrative costs, in securing removal of the subject sign, and reasonable attorney's fees of $1,200.00 (One Thousand Two Hundred and No/100 Dollars) pursuant to section 391.034(c) of the Texas Transportation Code.

~~IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant, the State of Texas, by and through the~~

~~Texas Department of Transportation, is awarded a permanent injunction requiring Plaintiff, Pat Barber, to remove immediately the illegal sign described herein;~~

It is further ORDERED, ADJUDGED and DECREED that Plaintiff Pat Barber is permanently restrained and enjoined from displaying and maintaining the illegal outdoor advertising sign located in Mitchell County, Texas, along the north side of Interstate Highway 20 near mile point 980+94, on a tract of land abutting Interstate highway 20;

It is further ORDERED, ADJUDGED and DECREED that the Clerk of this Court shall issue a writ of injunction in conformity with the terms of this Order and that the same be served upon the Plaintiff Pat Barber;

It is further ORDERED, ADJUDGED, and DECREED that no bond shall be required of Defendant, State of Texas, for the issuance of this permanent injunction;

It is further ORDERED, ADJUDGED, AND DECREED that Defendant do have and recover courts costs, other costs incurred in this suit expended, and reasonable attorneys' fees of $1,200.00 (One Thousand Two Hundred and No/100 Dollars) against Plaintiff, Pat Barber;

It is further ORDERED, ADJUDGED AND DECREED that all writs and processes for the enforcement and collection of this Judgment or the costs of Court may issue as necessary.

All other relief not expressly granted herein is denied.

SIGNED THIS 5TH DAY OF May, 2000.

/s/ Mary Pearl Williams
JUDGE PRESIDING

APPROVED AS TO FORM
AND PREPARED BY:

/s/ Wm T. Higgins V
William T. Higgins
Assistant Attorney General
State Bar No. 00790879
Transportation Division
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No.98-09717

PAT BARBER,	§	IN THE DISTRICT COURT
Plaintiff	§	
V.	§	
	§	OF TRAVIS COUNTY,
TEXAS DEPARTMENT OF	§	TEXAS
TRANSPORTATION, ET.		§
AL.	§	
Defendants	§	201ST JUDICIAL DISTRICT

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT REGARDING ATTORNEY'S FEES

Pat Barber, Plaintiff, files this Response to Defendants' Motion for Summary Judgement.[1]

I. PROCEDURAL BACKGROUND, HISTORY OF THE CASE, AND FACTS

Pat Barber erected an 8' x 16' political billboard on his private ranch adjoining Interstate 20, near Colorado City, Texas, on June 26, 1998. He put up the sign because of the number of vehicles of interstate travelers being searched by state police officers and his concern about the legality of those searches. The sign stated, "Just say NO to Searches," and had a phone number (915--728-5505) dedicated to an answering machine that related a two-minute public service message about citizens' constitutional rights regarding searches.

A few days after erecting of the billboard, the Texas Department

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[1] This response refers to Defendants collectively as "TxDot."

of Transportation (TxDOT) mailed a letter to Plaintiff, demanding removal of the billboard. TxDOT took this action even though many other roadside signs in the county had not been in compliance with the statute in question for many years.

Correspondence then began between Pat Barber and TxDOT officials. Mr. Barber argued his billboard was exempted from application of the Texas Highway Beautification Statute and, further, the statute, as applied by TxDOT, violated his free speech rights under the United States and Texas Constitutions.

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TxDOT officials disagreed with Mr. Barber's interpretation of the law and eventually set a final deadline of September 25 to remove the billboard, or TxDOT would pursue legal remedies to remove the billboard. On August 28, 1998, Pat Barber filed suit against TxDOT in this Court, asking for temporary injunction, declaratory judgment, and permanent injunction against the agency. A hearing was held in this Court on September 24, one day before TxDOT's threatened enforcement deadline. Judge Covington, 201st Judicial District Court of Travis County, requested briefs, took the matter under advisement and ordered the State to stay any attempted enforcement of the statute at bar against Mr. Barber until further order of the Court.

On October 6, 1998, the Court issued a temporary injunction prohibiting attempted enforcement of the statue against Mr. Barber, pending outcome of this suit and until a determination on the merits. The Court found it was probable that Mr. Barber would prevail on his claim that the statute violated his constitutional free

speech rights, and that Mr. Barber's political message could not be communicated to its intended audience in any other practical manner.

Over a year later, on October 25, 1999, a hearing was held on each parties' Motion for Summary Judgment. Another Travis County district judge, Judge Mary Pearl Williams, who was newly assigned to the case, indicated orally, from the bench, her intention to grant the State's motion and to deny Mr. Barber's motion concerning the constitutional issues. She further indicated her intention to dissolve Judge Covington's temporary injunction restraining TxDOT enforcement action regarding the removal of the billboard.

Shortly thereafter, and before any judgment or order was signed, Mr. Barber's attorney asked the State's attorney if TxDOT would postpone any attempted enforcement action to remove the billboard until the constitutional issues could be resolved on appeal. The State's attorney declined. Therefore, on November 4, 1999, Mr. Barber voluntarily removed his billboard from his property before the order was signed on November 23, 1999, regarding the October 25th summary judgments hearing.